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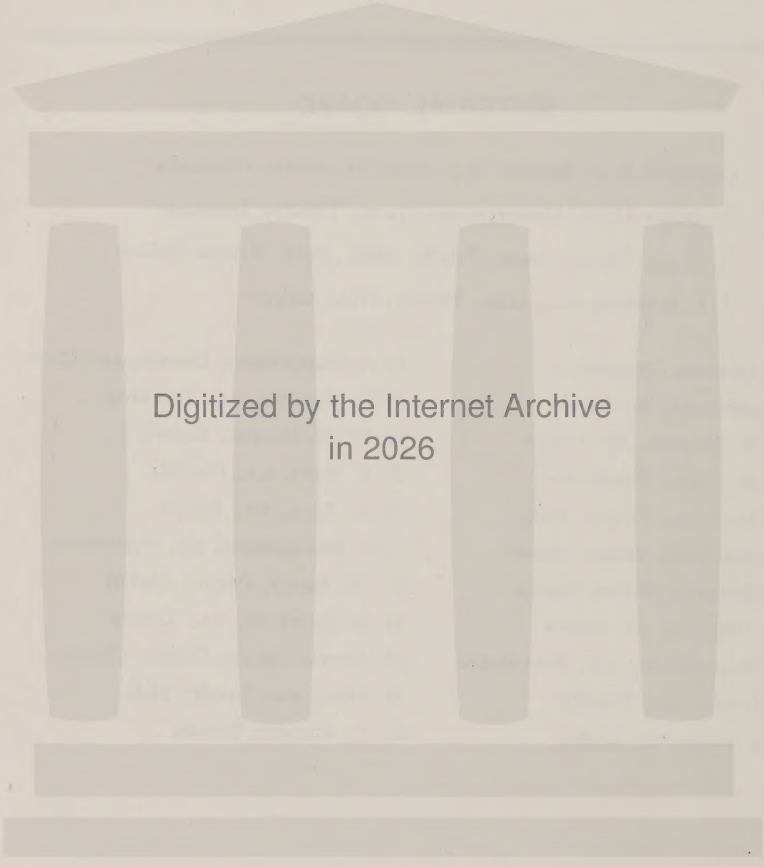

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JURISDICTION, PRACTICE AND PROCEDURE OF THE COURT OF APPEAL[1]

LORD JUSTICE COHEN

I HAVE been invited to talk to you tonight about the Court of Appeal in England, its jurisdiction, procedure and practice, and the first point I would make is that, as was recently emphasised by Mr. Justice Romer, there is no such thing as an inherent right of appeal to the Court of Appeal. That court is a creation of statute and its jurisdiction is limited to that conferred on it by statute. As we now know it, it has power ' to give any judgment and make any order which ought to have been made and to make such further or other order as the nature of the case may require '. One hundred years ago there was no court which had such wide jurisdiction. Indeed, there was, strictly speaking, no Court of Appeal at all.

A party aggrieved by the decision of a court of first instance was not, however, entirely without remedy. If the judgment of which he complained was given by a court of Common Law he could bring the matter before the Court of Exchequer Chamber. But as the present Master of the Rolls pointed out in a recent address ' the procedure ' before that court ' was not an appeal as we now understand it; it was in general by writ of error, a procedure . . . at once too narrow and too wide—too narrow because in order to succeed you had to establish some error upon the record, too wide because if you did, the Court would generally be bound to give relief, however unsubstantial was the error shown '.

If a litigant was aggrieved by a decision in the Court of Chancery there was something more like the present appeal. Under a statute of 1729 a decision of the Master of the Rolls was valid subject to an appeal to the Lord Chancellor, and on that appeal the Lord Chancellor reheard the whole matter and could make such order as he might think just. Moreover, if the decision was that of the Lord Chancellor himself, he could grant a rehearing of the case, and Lord Eldon was often known to do so. This procedure, however, was, as those of you who know your Dickens, and in particular *Bleak House*, will recognise, anything but satisfactory. It provoked a poem—and again I borrow from the

[1] A lecture delivered, on July 12, 1950, in the special course for foreign lawyers held at Cambridge.

Master of the Rolls—which indicates some of the objections to this procedure.

> 'Mr. Leach made a speech,
> Angry, neat but wrong.
> Mr. Hart, on the other part,
> Was heavy, dull and long.
> Mr. Parker
> Made the case darker,
> Which was dark enough without.
> Mr. Cook cited his book
> And the Chancellor said : "I doubt".'

The process of appeal in Chancery was, therefore, not satisfactory, and it was not made any more satisfactory by the fact that if the matter came before the House of Lords, the same Lord Chancellor who had already heard the case once, if not more often, would be found sitting again in the final Court of Appeal. The first step towards a Court of Appeal as we now know it was in 1851, when two Lord Justices of Appeal in Chancery were appointed to constitute, with the Lord Chancellor and the Master of the Rolls if they chose to sit, a Chancery Court of Appeal. It was not, however, until 1873 that the substantial reform which forms the basis of our present Judicial system became law. The Judicature Act of that year fused all the courts of first instance into one High Court of Justice and constituted a Court of Appeal to hear appeals on all *civil* matters whether those matters arose in the Chancery Division, in the Common Law Division or in the Probate, Divorce and Admiralty Division, the three divisions into which the High Court was by the Act divided. I would emphasise the word *civil*, for the Court of Appeal has, generally speaking, no jurisdiction in criminal matters. That jurisdiction is vested in the Court of Criminal Appeal, which was constituted by the Criminal Appeal Act, 1907, and consists of the Lord Chief Justice and the other judges of the King's Bench Division of the High Court. They do not all sit at the same time, the quorum is three.

The Court of Appeal, as I have said, was constituted by the Judicature Act, 1873, and the principal statute now governing its functions is the Supreme Court of Judicature Act, 1925. Under that Act, as modified by subsequent Acts, the Court of Appeal is part of the Supreme Court of Judicature in England and consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division and eight Lord Justices. Normally the Lord Chancellor, the Lord Chief Justice and the President do not sit in the Court of

Appeal; the court usually sits in three divisions presided over respectively by the Master of the Rolls and the two senior Lord Justices. A fourth division can, however, be formed if the state of business requires it, for which purpose, as well as in the event of absence of a Lord Justice owing to illness or other cause, a Judge of the High Court may at the request of the Lord Chancellor sit as a member of the Court of Appeal.

There is no rule as to how each division of the court shall be constituted save that it must, except in interlocutory matters or by consent of the parties or in vacation, consist of at least three members. It is, however, the usual practice of the Master of the Rolls, who is responsible for the constitution of the various divisions of the court, so to arrange matters that when the court is dealing with Chancery appeals there shall be one member of the court whose practice when at the Bar lay in the common law courts, while in a court dealing with common law matters there is usually one member who practised when at the Bar in the Chancery Division. This arrangement is calculated to secure the object of the sponsors of the 1873 Act, *i.e.*, to fuse law and equity.

I have said that the court must consist of three members except in interlocutory matters and in vacation. In interlocutory matters the court may consist of two members. In vacation the court does not make final orders; and in interlocutory matters, as the members of the court may be scattered, a single judge is empowered to make an interim order required to prevent prejudice to the claims of the parties pending the final disposal of the appeal. This power is not often called into play. The commonest case is, I think, where an application for an interim injunction has been granted or refused.

The jurisdiction of the court is defined by section 26 of the 1925 Act, and in effect, as I have said, it empowers the Court of Appeal to hear appeals in all civil matters from the various divisions into which the High Court is now divided.

The Court of Appeal hears appeals not only from superior courts, *i.e.*, the High Court of Justice, but also from inferior courts and in particular from the county courts. Prior to 1934 appeals from the county court went to a divisional court composed of two or more judges of the High Court and only reached the Court of Appeal if there was a further appeal from the Divisional Court. In 1934, to reduce the number of stages of appeal and to relieve the burden on the King's Bench Division, it was provided that appeals from the county courts should, except in a limited field, go direct to the Court of Appeal.

It may be convenient here to point out one important

distinction between appeals from the High Court and appeals from the county court. If an appeal from the High Court is from a judge sitting without a jury, the appeal is a re-hearing and the appellant—or for that matter the respondent—can challenge the judge's findings of fact as well as his ruling on law. If, however, the facts have been found by a jury the parties are bound by the jury's findings unless they can satisfy the Court of Appeal either that the judge had misdirected the jury or that there was no evidence on which the jury could properly find as they did. In appeals from the county court the rule is similar to that on appeals in jury actions. The appellant can only challenge the findings of fact of a county court judge if he can establish that there was no evidence to support the finding. It is but rarely that the appellant can discharge this onus.

There is no shorthand note of the evidence in the county court, the Court of Appeal has to get on with the judge's note of the evidence. The essence of county court procedure is that it should be expeditious and cheap. To fufil this end a county court judge must work at great speed and his note of the evidence is often not full. If a judge records a finding of fact in his note of his judgment, the Court of Appeal will not assume that there was no evidence to support it merely because the fact so found does not appear expressly in the judge's record of the evidence of the witnesses.

It might be convenient at this point to mention that even on an appeal from a judge of a superior court sitting without a jury the Court of Appeal has to bear in mind the advantage that the trial judge had of seeing the witnesses and forming an opinion as to their credibility. The House of Lords in *Watt* v. *Thomas* [1947] A.C. 484 has laid down rules for our guidance when approaching findings of fact by a judge. Let me quote the words of Lord Thankerton which are as follows :

> 'I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without

having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'

You will see, therefore, that those who seek to challenge a judge's finding of fact have not an easy row to hoe.

The county court is not the only inferior court from which appeals reach the Court of Appeal. Another instance is the Commissioners of Income Tax on whom rests the burden of assessing the taxpayers' liability to income tax and surtax. Yet others are an arbitrator appointed under the Arbitration Act, 1889, or the magistrates in civil matters. On appeals from these courts, as on appeals from the county court, the findings of fact by the inferior court cannot be impeached in the Court of Appeal. They differ from appeals from the county court in that appeal does not lie direct to the Court of Appeal. The appeal goes in the first instance either to a single judge as in Revenue appeals or to a Divisional Court composed of two or more judges of the High Court as in the case of cases stated by magistrates.

You may ask whether the decision of the Court of Appeal is final and puts an end to the litigation. The answer is that in most case it does, but sometimes there is a further appeal to the House of Lords. In no case can there be such an appeal without leave of the Court of Appeal itself or the Appeals Committee of the House of Lords.

From what I have said hitherto you might assume that in civil matters there is an unrestricted right of appeal to the Court of Appeal. That, however, is not the case. I will not weary you with much detail, but will mention a few cases where there is no right of appeal without special leave. Thus, in general, there is no right of appeal in interlocutory matters without the leave of the judge who made the order or of the Court of Appeal. Instances of exceptions to this general rule are matters affecting the liberty of the subject or the custody of infants or a decree nisi in a matrimonial case.

Again, there is no appeal without leave from a consent order, or on matters of costs which are left to the discretion of the court.

A more important limitation is in the case of county court decisions where the debt alleged to be due or the damage alleged

to have been done does not exceed £20. In such cases there can be no appeal without special leave from the county court judge.

In cases where leave to appeal is required, applications should be made in the first instance to the judge who made the order, but if it is refused, and such refusal is not conclusive as in the case last-mentioned, application may be made to the Court of Appeal. Leave will be granted where a matter of principle arises for the first time for decision. Leave will as a rule be refused if the order from which it is desired to appeal amounts only to an exercise of discretion, since the Court of Appeal will not interfere with a judge's exercise of a discretion entrusted to him unless he can be shown to have gone wrong in principle or where manifest injustice would be cause if the order was allowed to stand. The old Scottish proverb 'Many a mickle makes a muckle' does not apply and a number of trivial objections to the order is not sufficient to justify interference by the Court of Appeal.

I may here conveniently mention the practice in Poor Persons Cases,[2] *i.e.*, cases where owing to the limited means of a party, free legal assistance has been provided. If such a party desires to appeal to the Court of Appeal as a poor person, it is considered, I think rightly, that such assistance should not be made available unless there is a prima facie case for believing in the prospects of success of the appeal if it is allowed to proceed. The papers are therefore read by one member of the Court of Appeal. If he certifies the case as fit for appeal, the appellant will get free legal assistance in the Court of Appeal. If the certificate is refused he can only appeal at his own expense and risk.

The next matter on which a few words may be of interest is the question of the time within which the appeal may be brought. Here I must draw a distinction between decisions in interlocutory matters and final orders or judgments. In interlocutory matters notice of appeal must be given within fourteen days of the order. In other matters six weeks are allowed. For this purpose, generally speaking, an order is final if it finally determines the rights of the parties; if, on the other hand, it only gives directions for working out the rights of the parties, it is interlocutory. When the order appealed from is an order dismissing the appellant's application, the time is calculated from the date when the judge gave his decision. In other cases it is calculated from the date when the order is drawn up. To prevent injustice arising from these provisions as to time limit the rules enable the judge making the order, or the Court of Appeal, to extend the time. Such an extension is not granted as a

[2] This lecture was delivered before the Legal Aid and Advice Act, 1949, came into force.

matter of course : the court has to consider all the circumstances of the case in order to see whether the justice of the case requires an extension.

I need not trouble you with the form of the Notice of Appeal, except to point out one matter in which there is an important distinction between appeals from the High Court and appeals from the county court. On appeals from the High Court it is unnecessary to state the grounds of appeal unless the appellant is seeking a new trial of an action heard with a jury. But where the appeal is from a county court, the Notice of Appeal must state the grounds of appeal. Moreover, on appeals from the county court the appellant can only raise points of law which he took in the court below.

You may ask what is the reason for not requiring the grounds of appeal to be stated on appeals from the High Court where there is no jury. It is, I think, because the appeal is a rehearing : if the court comes to a different conclusion on the facts, points of law may arise which were never discussed in the lower court.

Let me now suppose that Notice of Appeal has been duly entered and the case is due to come into the list for hearing. It is the duty of the appellant or his solicitors to see that the court is supplied with the requisite papers and he has to lodge them a week before the case is likely to be in the list. This does not mean that the members of the court will necessarily read the papers before the case comes on. Our procedure differs substantially from that which I understand prevails in a number of countries overseas. The papers supplied are confined to the Notice of Appeal, pleadings, orders in the court below, documentary evidence which was before that court, a transcript of the shorthand notes of the verbal evidence, or in the case of county court appeals the judge's note of that evidence, and a transcript of the shorthand note of the judgment, or if none such is available, counsel's note of the judge's reasons for his decision. No written argument is supplied : the matter is argued out in court.

Some of my colleagues look at the papers before the hearing in order to get an idea of the points at issue, others think that it is better not to do so in order to avoid any risk of prejudicing one's mind before hearing counsel's arguments, but whichever course we may individually adopt counsel for the appellant has a completely free hand, subject of course to the risk of interruption by the members of the court, in presenting his case as he thinks best in the interest of his clients.

In appeals from final orders the evidence is confined to the evidence which was before the court below unless the Court of Appeal grants special leave to adduce further evidence. In practice such leave is only granted if :

(a) the evidence which it is sought to adduce was not at the time of the hearing in the court below available to, and could not with reasonable diligence on his part have been made available to, the party seeking to adduce it; and

(b) the evidence, if admitted, might materially affect the result.

Let us now enter the Court of Appeal at the commencement of a case. Counsel for the appellant, or the senior counsel if there be more than one, opens the appellant's case, unless counsel for the respondent says that he has a preliminary objection, *e.g.*, that the appeal is out of time, in which event that preliminary objection is dealt with first. Let us assume it is overruled. Counsel states the judgment from which the appeal is made, gives the relevant facts and in due course reads the shorthand note of the judgment in the court below and so much of the evidence as he considers material to a decision of the case. I emphasize 'material' because he does not, or at any rate he should not, confine himself to the evidence which he considers supports his point of view, but calls attention to all evidence, pro and con, which bears on the points he desires to argue. This being a country where the rule of '*stare decisis*' applies, he also calls attention to any authorities which he considers in point.

When he has finished, junior counsel follows on the same side if he desires to do so, but the court will never hear more than two counsel on one side.

The respondent's counsel then presents his argument in support of the learned judge's judgment. He is not confined to the reasons which the judge in the court below has given for his judgment. Nor is he limited to points taken in the lower court. Even in appeals from the county courts, although in such appeals, as I have already mentioned, the appellant is limited to points of law which he took before the county court judge, a respondent may support the judgment on any ground which he considers tenable or perhaps I should say arguable. When he has finished, junior counsel for the respondent may follow him if he wishes to do so. Finally one counsel for the appellant is heard in reply.

That is the end of the argument unless counsel in reply has cited some authority to which reference had not been made before. If he has done so, his opponent will be allowed to add some observations on the new authority.

When the argument is over the court may either deliver judgment extempore or reserve judgment. Most of its judgments are extempore. Such has been the pressure of work in recent years, that serious arrears would have accumulated had this not been so. It is questionable whether this practice is altogether desirable. As I have said, in most cases the decision of the Court of Appeal is final and,

owing to our rule of '*stare decisis*', its decision will be binding thereafter not only on the lower courts, but on the Court of Appeal itself. We are all fallible and a hasty decision—even an ill-considered dictum—may cause no end of trouble thereafter. A dictum is, it is true, not binding on anyone—even on its author—but it is sure to be cited as authority and it is sometimes very difficult to distinguish between dictum and ratio decidendi. The risk of unreliable dicta would be less if more judgments could be reserved and I hope therefore that when we get fully up to date with our work, we shall be allowed an occasional day off to write reserved judgments. If the court reserves its judgment, the case is put in the list at a later date for that judgment to be delivered. As it is not the usual practice to discuss the question of costs until the result is known, the court will hear argument on costs when judgment has been delivered if either party desires to argue that costs ought not to follow the event. The commonest occasion in which this usual result does not ensue is in a case on the construction of a will. While the appellant appeals at his own risk, it is not uncommon to allow the costs of all parties out of the testator's estate if the court thinks the point was one of real difficulty, especially if the appellant has been appointed to represent a class and he himself has only a small interest in the result. Another instance of complication is where the appeal only succeeds in part. In that event the court may award to each party the costs of a particular issue, but it does not like adopting this course as it leads to difficulty and expense on taxation. To avoid it, it is not uncommon to award the partly successful appellant only a specified portion of the costs of the appeal.

You may ask what happens if the judges differ. The decision of the majority prevails: each judge gives his reasons for his conclusion or adopts the reasons given by one of his brother judges. If the appeal is heard by an even number of judges and they are evenly divided in their conclusion, the decision of the court below stands unless in the case of a final appeal the case has been heard by consent by two judges only. In the last mentioned case either party may demand a rehearing in the Court of Appeal before three judges.

It has been suggested that it would be better if the practice of the Privy Council were adopted and only one judgment was delivered representing, of course, the view of the majority. There is much to be said in favour of this practice, but there are two formidable objections to it. In the first place it may well be that the judges constituting the majority reach the same conclusion for different reasons. In such a case it might be difficult to embody the ratio decidendi in a single judgment. The second objection is that if there is to be an appeal to the House of Lords, it is desirable that the views of the

dissenting minority as well as those of the majority should be available to assist their Lordships in their deliberations. Another proposal has been put forward—indeed it was the original intention of Parliament in 1873 when the Court of Appeal was established—that, applying the maxim '*Interest Reipublicae ut sit finis litium*', the decision of the Court of Appeal should be final in all cases and that the existing system under which in some cases there may be a further appeal to the House of Lords should be abolished as adding unnecessarily to the expense of litigation. Before the 1873 Act became law, the provision to that effect was repealed principally because of one objection which is, I think, conclusive. England and Scotland and for that matter Northern Ireland have separate courts and the system of law applied in the Scotch courts differs in many important respects from that applied in the other two countries. There are, however, some general principles of law common to all these systems and many statutes which are applicable to all of them. It would be unfortunate if in this common field a different rule was to apply according to where the litigation was carried on. I do not think we can expect the courts of Scotland and Northern Ireland to accept as binding the decisions of the Court of Appeal in England. The possibility of such a conflict, therefore, can only be avoided by having a superior tribunal such as the House of Lords whose decisions are binding on the courts of all three countries.

My account of the practice and procedure may have suggested to you other matters which appear to involve the litigant in avoidable expense. I can assure you that the need for ensuring cheap justice is very present to the minds of the heads of the Judiciary and to H.M. Government. There is at present sitting a committee under the chairmanship of the Master of the Rolls which is considering the practice and procedure of the Supreme Court of Judicature from this very angle.

One of the questions which has been raised is whether considerable economy could not be effected in the Court of Appeal if the arguments on both sides were reduced into writing and the hearing in court limited in duration or abolished altogether. I doubt the wisdom of adopting this suggestion. In the first place the economy would not be as large as might at first sight be supposed, for the written argument must be full and counsel would be entitled to a substantial fee for preparing it. Moreover, it would, I think, be inadvisable to dispense altogether with the hearing in court for (a) points may occur to the court which have not been dealt with in the written arguments; (b) the court may well desire to clarify points which seem to them obscure in those arguments.

There is another advantage in our present system. As I have

said, I do not think it would be advisable to prohibit dissenting judgments. On the other hand the fewer of them there are the better, and I think that a comparison of our records with, *e.g.*, those of the Supreme Court in the U.S.A. would show that dissent is far less frequent in the Court of Appeal in England than in the Supreme Court.. I believe the interchange between judges and counsel enables each member of the court to appreciate how the minds of his brethren are working and tends to produce a consensus of judicial opinion at the end of the argument.

It must also be remembered that the majority of appeals which come from the county courts and many of those from the High Court do not involve a lengthy hearing. If in such cases written arguments had to be submitted, there would be little or no saving of the litigants' money, and a waste of judicial time.

The suggestion has also been made to the committee presided over by the present Master of the Rolls that the rule applicable on appeals from the county court should be extended to appeals from the High Court, and that in no appeal should it be open to the court to disturb a finding of fact of the lower court unless the Appellate Court be of opinion that there was no evidence to support the finding. I do not wish to express a concluded opinion on the point. I will, therefore, only say that judges being fallible the exclusion of all appeals on fact might work injustice. The importance of cheapening the cost of suits in the county courts makes the existing rule essential on appeals from those courts, but I am not sure that this principle could with advantage be applied to appeals from the High Court where the presence of shorthand writers insures that a full report of the evidence is available for the Court of Appeal and the issues may involve not only large sums of money but questions of vital import to the parties which can not be assessed in money.

May I conclude by a few short observations on the principle of '*stare decisis*'. I hesitate to involve myself in a subject where the professors and pundits differ. Despite the criticisms on that principle of the present editor of the *Law Quarterly Review*, I incline to think its advantages greatly outweigh its disadvantages. Uncertainty in the law is a supreme disadvantage and if we abandon the principle of '*stare decisis*' we open the door wide to uncertainty. Professor Goodhart has, I believe, said that the effect of the rule is to make us slaves to the past and despots for the future. With all deference, that is I think, an attractive phrase, but an exaggerated statement. In the first place, if the Court of Appeal thinks it is driven by an earlier precedent consisting of one of its own decisions to a conclusion which works injustice, it can give leave to appeal to the House of Lords. The House, being a part of Parliament, is not

in theory so strictly bound by precedent as is the Court of Appeal, though it naturally treats with great respect and rarely disturbs earlier decisions of its own and it hesitates to disturb a long-established rule, even if that rule rests on the decision of a lower court. In the second place, legislative action can always reform the law as it has recently done in the case of contributory negligence. I think there is much to be said for a rule which prevents the Judiciary from usurping the function of the legislature and tends to certainty in the law.

You may think that the practice and procedure of the Court of Appeal as I have outlined it to you is better or worse than that which prevails in the countries from which you come. You will, I am sure, agree that it is directed to the same end which is the common pride of all of us, the impartial administration of justice in all triable issues as between man and man and between the individual citizen and Departments of State.

SOME POINTS OF COMPARISON BETWEEN THE COMPANIES ACT, 1948, AND THE FRENCH LAW OF COMPANIES [1]

JEAN ESCARRA

THE paper I am going to read is a study in comparative jurisprudence. I propose to examine some aspects of Company Law, and especially of the law relating to companies limited by shares. From the many differences existing between French and English Law on this matter, I have selected several points, in the setting up as well as in the management and administration of such companies, which seem typical to me. These are as follows :—

As regards the setting up of companies, I have thought it would be interesting to compare how French and English Law deal with :—

(A) The subscription of share capital;

(B) the prospectus or the other documents designed to serve the same purpose;

(C) the part played by the statutory meeting.

As regards the management and administration, I have chosen to examine :

(D) The powers of directors, and how they are restricted in England according to the doctrine of *ultra vires*, as compared with the French system of legal personality;

(E) the audit and inspection of companies.

As a conclusion of this reading, I shall present a few remarks connected with the method and aims of comparative jurisprudence.

(A) When dealing firstly with the question of the share capital, we note that in England, at the time of the setting up of a company, the memorandum of association must state the amount of capital with which the company proposes to be registered. But it does not follow that the whole amount is to be subscribed from the start. By signing the memorandum, the promoters have agreed to take the number of shares set opposite their names. Then, application for shares can be made by persons wishing to become members of the company. It is left to the directors to fix the minimum amount which must be raised

[1] A lecture delivered in the Law School of the University of Cambridge on October 25, 1950.

in order to enable the company to engage upon its business. Thus the figure of the *issued* capital is not usually the same as that of the *authorised* capital. From time to time, according to its needs, the company will proceed to further allotment on its unissued capital.

In France, things are quite different. The amount of share capital, whether it is to be paid up in cash or otherwise, must be fully subscribed before the company can be formed and legally begin its existence.

Its figure has been chosen by the promoters and stated in the proposed articles of association which they have registered with the Registrar of the Commercial Court. By the way, I must point out that those articles of association are provisional. As we shall see later on, it is left to the 'assemblée constitutive' (*i.e.*, the statutory meeting) to vote upon them before the company is finally set up.

Of course, when shares are issued to the public generally, it does not always happen that the amount of capital is exactly subscribed. There may be too many applications; then, shares are allotted to subscribers in proportion to their respective subscriptions.

But it may also happen that the figure set out as the amount of capital is not reached. Then the company cannot be set up, unless all the subscribers unanimously agree to form the company with a reduced capital.

When there are a large number of subscribers, that unanimity as to the reducing of the capital to a lower figure may be difficult to achieve. On the other hand, if the company cannot be formed, the promoters will lose all the preliminary expenses they have laid out, and will have to start all over again the proceedings of setting up the company with a reduced amount of capital.

In practice there are several methods of avoiding this difficulty. For instance, the form of application can provide that, if the prescribed amount of capital is not entirely subscribed, the statutory meeting shall have power to reduce the capital to the amount actually subscribed. Thus, the subscribers in this case have agreed beforehand to reduce the capital, and so there is no question as to the validity of such reduction. More often, however, the promoters enter into an agreement with a banker or bankers whereby the latter undertake to act as underwriters and subscribe for all the shares which are left over by the public.

From the above rule, it follows that no shares can be issued at a discount, even when the capital happens to be increased. If shares could be issued at a discount, the amount stated as capital could never be entirely paid up. It also follows that a company cannot issue shares without nominal value. Each share must have a nominal value shown on the face of it, to make sure that the total of all the shares is equal to the capital.

Here I must put in a remark. When I say that the whole amount of capital must be subscribed before the company is formally set up, it does not mean that the whole amount must be actually paid up. The promoters may fix what amount is to be paid at the time of application, provided this amount is at least one quarter of the nominal value of the share. The unpaid portion must, now, be called before the end of the five years following the setting up of the company. This is a rule introduced a few years ago by a law of March 4, 1943. The same law also provides that no increase of capital and no borrowing by way of debentures can take place before the whole amount of capital has been called up.

It may be wondered why French Company Law has so stringent a rule about subscribing the whole amount of the capital from the start.

The reason is that the prospective creditors of the company must be able to rely on the capital stated in the articles of association as really existing. It is that capital they consider when they enter into dealings with the company. We look upon it as a kind of guarantee given to the creditors, a guarantee which must remain permanent all through the life of the company, unless of course it is altered in the manner provided by law. This rule of the fixity of the capital is regarded as essential in our company law.

In England, the rules relating to capital are more flexible. The directors have wider powers with respect to the amount of capital they think it is necessary to call up for the purposes of the company. However, there is no doubt that the issued capital must always have as a consideration the net assets of the company. Any act of the directors which would reduce the assets to a level below the figure of the issued capital would be held to be *ultra vires*. But it remains true to state that the English notion of capital is very different from the French or, better to say, the Continental system.

(B) Now, a crucial problem in Company Law is that of the prospectus.

When a company is being set up in this country, one of the main steps to be taken by the promoters is to issue a prospectus. Speaking in general and to say nothing about the exceptions to the rule, it is unlawful to issue any form of application for shares in or debentures of a company without previously issuing such a prospectus. It is designed to give the public reliable information on everything they may be interested to know about the company that is being set up.

The Fourth Schedule to the Companies Act, 1948, gives a list of the matters to be stated and the reports to be set out in the prospectus.

As regards those matters and reports, there is one important point to notice for the purpose of this lecture. The prospectus deals with the case of shares and debentures fully or partly paid up otherwise than for cash. The consideration for those shares and debentures may be either property purchased by the company or benefit paid or given to any promoter. That is a vital point whereof the public is entitled to know every possible detail. It is obvious that it would be only too easy for unscrupulous promoters to defraud the public by keeping useful information in the dark.

As we shall see later on, the French Law has devised other means of checking the value of the consideration for shares allotted otherwise than for cash.

In France, there is an official gazette where statements and notices relating to companies are published. It is called ' Bulletin des annonces légales obligatoires à la charge des sociétés financières '. For short, by taking the initials of its name, we call it B.A.L.O. This *Bulletin* is periodically published as an annexe to the *Journal Officiel*, the French Governmental gazette.

When there is an offer of shares issued to the public generally, a statement about it must previously be published in the B.A.L.O. That statement is called ' une notice '.

This rule dates back to a law of January 30, 1907, when it was thought necessary to give better protection to investors. It applies to the issuing, exhibiting, offering for sale, and putting on the market of all kinds of shares in or debentures of companies. It refers to issuing in the largest possible sense of the word. For instance even mere preparatory measures such as circularising bankers to ask them to procure subscriptions, fall within the scope of this rule.

A statement must be published in the *Bulletin* before any advertising of the issue. It is binding on the persons who issue,

exhibit, offer for sale, or put on the market the shares or debentures. In practice it will be the duty either of the promoters, or of the bankers acting as underwriters.

Unfortunately there is no legal provision as to who is liable for the making up of the statement. Consequently it cannot always be entirely trusted to be reliable information.

The points to be mentioned in the statement refer to: (1) the name or title of the company; (2) the law (whether French or foreign) the company is subject to; (3) the registered office of the company; (4) the objects for which the company is established; (5) the length of time the company is going to last; (6) the amount of share capital, the nominal value of every class of shares and the amount of the uncalled capital; (7) a certified copy of the last balance sheet, or a statement that no balance sheet has yet been drawn up; (8) the advantages or benefit given to the promoters and directors or any other persons; also any shares allotted otherwise than for cash and the consideration for those shares; (9) the rules as to the calling of the general meetings, the place of such meetings, etc.

In the case of a foreign company issuing shares or debentures in France, a complete translation, in French, of its articles of association must be published in the B.A.L.O.

There is a penalty of fine attached to the above regulations. The subscribers can sue for damages because of omissions or misrepresentations in the 'notice', but their subscriptions cannot be declared void on that ground alone.

In every advertisement, prospectus or circular relating to the issue, the above-mentioned points must be reproduced at full length. Reference as to the date and number of the B.A.L.O. in which the notice has been published must also be stated. When advertising in newspapers, the same reference to the B.A.L.O. must also be stated, though in an abridged form.

Besides the statutory statement I have just talked about, the promoters often publish a document to advertise the issue and bring about subscriptions. Such document is called 'prospectus d'émission' and is usually distributed together with the form of application. It must not be mistaken for the prospectus that plays such an important part in English Company Law; it is only an advertisement of the issue. It is not a necessary step in the setting up of companies; it can very well be done without. It does not need to be registered. Moreover, although it must state the points already mentioned in the 'notice', there are no definite rules as to its contents.

However, it is very important for investors to be able to rely on an accurate ' prospectus d'émission '.

Unscrupulous promoters might make people too easily subscribe for shares by setting out a cleverly drawn up ' prospectus d'émission '. In 1935 and 1938, several measures were taken in order to give better protection to investors. The Décret of August 8, 1935, provided that the prospectus must be signed by the person or the qualified officer of the company who issues it. The surnames, first names and addresses of the directors of the company must be stated, and also whether the shares or debentures offered for sale are quoted on a Stock Exchange and on which Stock Exchange. Thus, if an action is to be brought against the promoters or the underwriters for mis-statements in the ' prospectus d'émission ', their names will be known at once.

Offenders are liable to a heavy fine, without prejudice to the penalty attached to the law of January 30, 1907, which we have already met with. Moreover, when inaccurate or false statements have knowingly and wilfully been made in the ' prospectus d'émission ', offenders are liable to imprisonment for a term not exceeding ten years and a fine.

(C) One of the main differences between French and English Law as regards the setting up of companies, lies in the part played by the statutory meeting.

In England, the existence of a company as a legal being does not rest upon the convening of a statutory meeting. Every company begins its legal existence from the time it is granted a certificate of incorporation by the Registrar of Companies.

Moreover, the statutory meeting only takes place after the company has been entitled to engage upon its business. Here again, there is a certificate delivered by the Registrar of Companies when he is satisfied that all the procedure of setting up has been complied with. That certificate is conclusive evidence that the company is entitled to commence business.

Any contract made by a company before the date at which it is entitled to commence business is provisional only, and it is from that date that it becomes binding on the company.

In England, if a company does not hold a statutory meeting within the prescribed limits of time, it is liable to be wound up by court. But, instead of winding up, the court can make an order that a meeting shall be held.

Thus, as we have just seen, the date of the statutory meeting is quite immaterial as regards the time when the company is

incorporated and the date from which contracts are binding on the company.

In French law, the part played by the statutory meeting, which is called ' assemblée constitutive ', is far more important. It causes the company to begin its legal existence, and that brings about many consequences we shall see later on.

The ' assemblée constitutive ' is first of all called upon to give its approval of the articles of association. These had been registered as a draft by the promoters with the Registrar of the Commercial Court. The draft may have been slightly altered in the meantime, and the meeting is called upon to vote for the articles of association in their final text.

Then, the meeting has to elect the first officers of the company, that is the first directors and auditors. If directors have been nominated in the articles of association, that nomination must be ratified by the meeting.

Finally, the promoters must let the meeting know about and obtain its approval of the various proceedings taken in issuing the capital. As evidence of this, they must produce various documents such as : (1) A formal statement made by a ' notaire ', certifying that the share capital has been completely subscribed and the prescribed amount on each subscription has been paid up in cash; (2) a list of the shareholders, together with their application forms duly filled up; (3) a return of all the money paid for subscription and a receipt signed by the person who has been entrusted with the funds (usually, the ' notaire ' or the ' Caisse des Dépôts et Consignations ').

The above proceedings are taken when all the issued capital is subscribed for cash. But a company can also receive property as a consideration for part of the issued capital. Then two meetings must be held in order to check the exact value of such property. That may be : real property, or a trading concern, or goodwill, or patents, trade marks, etc. We call it ' apport en nature '.

A similar course is taken when a shareholder or a group of shareholders is or are granted a special advantage or benefit,— we call this ' avantage particulier '. That may happen when shareholders receive founders parts (' parts de fondateur ou parts bénéficiaires '). These may be allotted to them as an extra payment for their contribution, especially in promoting the company. They have no nominal value and are no part of the share capital; but, like shares, they may be paid a dividend according to what is stated in the articles of association.

As we have said, the checking and approval of the 'apports en nature' and the 'avantages particuliers' require the holding of two successive meetings.

By the way, I must come back to the above proceedings relating to the approval of the articles of association, the election of officers, etc. When there is cause for holding two meetings, those proceedings may be carried out at any one of them.

At the first meeting, all the subscribers for cash are called upon to nominate 'des commissaires aux apports'. Their office is to give their expert opinion on the allotment of shares otherwise than for cash. They check the value of the consideration for those shares.

When the company does not issue shares to the public at large, the 'commissaires aux apports' may be chosen from the shareholders themselves. In that case, there is no special qualification required in order to hold the office.

When the company issues shares to the public generally, one of the 'commissaires' at least must be chosen out of a list of experts. That list is drawn up by the courts for companies that are being set up within their jurisdiction. The experts must have technical qualifications, whether they are architects, engineers, etc., as the case may require.

However, whether the company issues shares to the public generally or not, certain persons are ineligible as 'commissaires aux apports'. Such are, for instance:

1. The promoters' and contributors' spouses; also their parents and relatives up to the fourth degree of relationship (*e.g.*, first cousin);

2. people who are in the employment of the promoters or contributors, or from a company investing ten per cent. at least in the new company;

3. people who are by law forbidden to take up a post of director, because of previous offences; also people who have been sentenced to resign from such office and so on;

4. the husbands or wives of all the above-mentioned people.

A fine of 12,000 to 240,000 francs—about £12 to £250—can be imposed upon any person who knowingly infringes the above rules. But such violation of the law does not make the valuation invalid. The promoters can only incur civil liability on that ground.

Before holding the second meeting, a written report is drawn up by the 'commissaires aux apports'. It is signed by them and is kept on record at the registered office of the company. It sets

out the opinion of the experts on the property or 'avantages particuliers' to be valued. It concludes by accepting or refusing the proposed estimate.

Copies of the report are printed or typewritten, and circulated among the shareholders five days at least before holding the second meeting.

As regards the proceedings of the 'assemblées constitutives', there are very elaborate rules to be observed. Those rules are the same whether one or two meetings must be held.

1. Every shareholder is called upon to vote, even if he only holds one share. There, it is different from an ordinary general meeting where a minimum number of shares can be required from any shareholder to entitle him to vote. When so provided by the articles of association, it is quite lawful. But in the 'assemblées constitutives', such limitation would be unlawful; every shareholder has a right to cast his vote on such an important matter as the setting up of a company of which he is to be one of the members.

2. On the other hand, it is advisable to prevent the holder of a large number of shares from imposing his will on the other shareholders. For that purpose, no shareholder can have more than ten votes, whatever the number of shares he holds.

3. There must be a quorum of members, holding together half the share capital issued for cash. If there are not enough members present at the meeting, the resolutions then voted will be provisional; they will become final, only if they are voted again at another meeting, where the quorum of members may be one fifth instead of one half.

4. There must be an absolute majority, that is to say half the number of the votes plus one, to make the decision final. When voting takes place on the report of the 'commissaires aux apports', those members who have received shares otherwise than for cash are excluded from the vote. That is so even if they also hold shares subscribed for cash, as, for an obvious reason, they must not influence the vote in any way. Neither are they allowed to vote on behalf of any other member wishing to vote by proxy, because of some possible fraud.

5. Finally there is a last rule to be complied with. The majority must include together at least one quarter of the shareholders and one quarter of the share capital issued for cash. This rule is designed to prevent a small number of shareholders imposing their will on the others. But is it sometimes difficult to combine it with the above rule excluding some members from the vote.

Such is the process devised by the French law in order to prevent the promoters of a company from 'watering' the assets representing shares paid up otherwise than for cash. Here again the difference from the English system is remarkable.

Let us now examine some problems related to the management and administration of companies and to their audit and inspection.

(D) In France as in England, companies are administered by directors, whom we call 'administrateurs'. In them are vested all the powers necessary to carry on the business of the company. They act as agents of the company, under the supervision of all the shareholders regularly called together in general meetings.

In practice, the articles of association give the directors a number of specific powers. But it would be quite enough to insert a general clause. Apart from the matters specifically ascribed by law to the general meeting of the shareholders, directors can usually do anything the company can do. Their powers are only restricted when there is an express provision in the articles for the general meeting to authorise a particular transaction.

However there is an important difference between French and English law in respect of the powers which can be exercised by directors.

In England, those powers are restricted to the objects stated in the memorandum of association. The funds of the company can only be applied in carrying out its authorised objects. Everything that does not come within, or is not reasonably incidental to, the objects specified in the memorandum is held to be *ultra vires*. Anything which is *ultra vires* the company is wholly void and cannot be enforced or ratified. Whereas anything which is *ultra vires* the directors, but not *ultra vires* the company, is invalid, unless and until it is ratified by the shareholders.

In France, there is no such limitation on the powers of directors. We look upon any company as having the same legal capacity as any individual being. No contract, for instance, can be deemed to be void on the sole ground that it is outside the scope of the objects stated in the articles of association. Directors can of course be held to be liable in case of mismanagement, but there is no question as to the validity of the contract as such. It will be binding on the company, unless it has been specifically stated in the articles of association that it was beyond the powers of the directors to bind the company in that way. To state it otherwise, some contracts may be *ultra vires* the powers of directors and need to be ratified by the general meeting of the shareholders, but they can never be *ultra vires* the company.

The *ultra vires* doctrine is a typical aspect of the English

system of law. It is the exact reverse of the French system. In France, it is taken for granted, when entering into a contract with a company, that it has a legal right to do so. On the contrary, in England, when there is a doubt about a transaction which could be deemed to be *ultra vires*, the company is presumed to be unable to perform it, and it is left to the other party to show that the transaction is *intra vires*.

The link between the *ultra vires* doctrine and the notion of juristic personality must be emphasised. In England a company is regarded as a juristic person, having perpetual succession and a common seal, as soon as the certificate of incorporation is delivered by the Registrar of Companies. But the legal personality of the company is strictly restricted by the *ultra vires* doctrine. It appears as a mere collection of powers defined by law. The company not only is prevented from acting, but has no existence outside its objects, such as they are specifically embodied in the memorandum of association. The acts which are not in compliance with the requirements of the memorandum, which are consequently outside the powers of the directors, are *ultra vires* and do not bind the company. As regards such acts, the company has no existence. So it is fair to recognise that there is a fundamental difference between the English and the continental conception of juristic personality.

(E) Finally, we come to the audit and inspection of companies. This is a very important part of the legal machinery respecting companies.

As regards the audit, both French and English law contain detailed regulations. However, generally speaking, the matter is more developed in England than in France, where there is still insufficient supervision of the management of companies.

Usually members have neither time nor qualification for making sure that the business of the company is run according to their best interests. Nor would it be practicable to allow them to investigate the company's affairs individually. It is the 'raison d'être' of the general meeting to examine the state of affairs of the company through the directors' report, the balance sheet and the profit and loss account drawn up for that purpose by the directors.

But in order to ensure that the members are given a fair and reliable view of the state of affairs of the company, auditors are appointed. They examine the accounts of the company beforehand and make a report on those accounts, to be read at the general meeting.

In England, an auditor or auditors are appointed at each

annual general meeting. They hold their office from the conclusion of that meeting, until the conclusion of the next general meeting.

The first auditors of the company may be appointed by the directors at any time before the first annual general meeting, but they can be removed by a general meeting and other persons appointed instead of them. If the directors fail to exercise their powers in that respect, the company in general meeting may appoint the first auditors.

A retiring auditor may be re-appointed without any resolution being passed. But there are some exceptions to this rule, for instance if he is not qualified for re-appointment; or if he has given the company notice in writing that he is unwilling to be re-appointed; or if a resolution has been passed at the meeting either appointing somebody instead of the retiring auditor, or providing expressly that he shall not be re-appointed.

Special notice must be given of intention to propose the appointment of a person other than the retiring auditor. The same notice is required if there is a resolution that a retiring auditor shall not be re-appointed without stating the appointment of any other person.

Where, at an annual general meeting, no auditor has been appointed or re-appointed, the company must within one week send notices to the Board of Trade who will appoint a person to fill the vacancy.

The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues, the surviving or continuing auditor or auditors, if any, may act.

In France, we also have auditors, who are called 'commissaires aux comptes'. By the way, they must not be mistaken for the 'commissaires aux apports' we have already met.

The first auditors may not be nominated in the articles of association. They are appointed by the 'assemblée constitutive', *e.g.*, the statutory meeting, and they hold office for one year. After that, they are appointed by the annual general meeting for a period of three years. When an auditor has been appointed in the meantime to fill a vacancy, he will hold his office only until the end of the three years' period. If the general meeting fails to appoint auditors, or if those who have been appointed cannot or refuse to hold their office, auditors are appointed by the President of the Commercial Court.

Although they are deemed to be the agents of the shareholders, they cannot be discharged from office ad nutum. They can be removed by the general meeting only on serious grounds. The courts can order that an auditor shall continue to hold his office

until the end of the three years' period, and even grant him damages for having been unduly removed.

As regards the persons qualified to be auditors, it is important to note that, in England, they must be members of a body of accountants recognised for the purpose by the Board of Trade. The Board may also authorise to act as auditors other persons either having similar qualifications obtained outside the United Kingdom, or having obtained adequate knowledge or experience. Moreover, in England, some people cannot act as auditors, as being, for instance, an officer or a servant of the company, or a person who is a partner of or in the employment of an officer or servant of the company.

In France, there are no special qualifications required from auditors when the company which appoints them does not intend to issue shares or debentures to the public generally. However, even in that case, some people are ineligible to act as auditors, Such are :

1. The directors' spouses; also their parents and relatives as far as the fourth degree of relationship;

2. persons in the employment, otherwise than as an auditor, of the directors and of any company or firm holding at least 10 per cent. of the capital of the company; also if the company holds at least 10 per cent. of the capital of the other company or firm;

3. persons who are by law forbidden to take up a post of administrator, because of previous offences; also persons who have been sentenced to resign from such office;

4. the husbands or wives of all the above-mentioned people.

In the case of a company which has issued or intends to issue shares or debentures to the public generally there is a further requirement. One at least of the auditors must then be chosen from a list drawn up by a special committee under the supervision of the courts. Only people with high character and technical qualifications are put on this list. They are formed into a body which enforces discipline upon its members.

When no such auditor has been appointed by the general meeting, the President of the Commercial Court may do so at the request of any shareholder, the directors of the company being called into the proceedings. The auditor appointed by the court has the same duties as if he had been appointed by the general meeting and he also holds office for three years.

In England as in France, the auditors have to examine the accounts of the company and check the accuracy of the balance sheet and the profit and loss account. They make a report which is read before the company in general meeting; it gives their

opinion on whether the accounts show a true and fair view of the company's affairs at the end of the financial year.

The auditors have a right of access at all times of the year to the books and accounts of the company. Moreover, in France, they have the right to convene a general meeting of the shareholders in case of emergency. This is so when they have noticed serious misdoings which might imperil the interests of the shareholders and justify the removal of the directors.

In France, auditors incur a penal liability for not complying with the rules as to their appointment and duties. They also incur a civil liability as agents of the company. If they do not disclose the wrongdoings of the directors which have come to their knowledge, they are liable not only for their own negligence, but also for the wrongdoings they have not disclosed.

I must admit that the French system of audit is far from having the same efficiency and reliability as the English system.

But it is in the matter of investigation that the superiority of English law has far-reaching consequences. In England the Board of Trade may appoint one or more competent inspectors to investigate the affairs of a company and make a report on the results of their investigation.

Such investigation may be carried out on the application either of not less than two hundred members or of members holding not less than one-tenth of the issued shares. The application must be supported by evidence showing that the applicants have good reason for requiring the investigation and they may be asked to give security for payment of its costs.

Investigation must also be carried out if the company by a special resolution, or the court by order, declares that such investigation is necessary.

The same course is taken when it appears to the Board of Trade that there are fraudulent or unlawful purposes in the way the company has been formed or managed, or that its members have not been given all the information with respect to its affairs which they might reasonably expect.

The Board of Trade inspectors have wide powers to require the production of all books and documents of or relating to the company. They may also investigate the affairs of any other body corporate that is related to the company and require the production of its books and documents.

All the officers and agents of the companies which are being investigated must give to the inspectors all the assistance which they are reasonably able to give. They may be examined on oath by the inspectors. If they refuse to produce any book or

document or to answer any question in connection with the investigation, the inspector may take the case to the court and the offender be punished in like manner as if he had been guilty of contempt of court.

In the case where the report of the inspectors shows that criminal liability has been incurred and prosecution ought to be undertaken by the Director of Public Prosecutions, the Board of Trade shall refer the matter to him. The Board may also present a petition to the court for the winding up of the company if the court thinks it just and equitable that it should be wound up. It may also present a petition to the court for another remedy than winding up in the case where the affairs of the company are being conducted in a manner oppressive to a minority of the members.

There is nothing in France that can be compared to the power of the Board of Trade to investigate into the affairs of companies. This wide power given to an administrative body to look into the affairs of private corporate bodies is typical of the English system and is quite unknown in French company law. In France, business people, whether individuals or companies, are very shy of any outside control. They don't like to let strangers know too much about their affairs. For that reason, it was not until 1935 that more effective regulations were made with respect to auditors, for instance. But it would still be quite unthinkable in France to give the Administration power to inquire into the affairs of companies.

My concluding remarks, after this survey of some aspects of English and French company law, should take into account more general problems of comparative jurisprudence. My audience is well aware of the various aims of this young science. Speaking in terms of legislative policy, we have the tendency to suppose that it is easy to improve our respective systems of law by borrowing, more or less at random, specific provisions from such foreign law or code as we deem suitable to our needs. From a purely personal point of view, I believe that English Company Law, although, technically speaking, it comes near to perfection, is so typically English that it would be hard to expect continental lawyers and business people to get accustomed to it. From previous experiences I have had, I think it is useless to bring into a country a system of law which has psychologically been devised for another country. Limited companies by shares are of course an international institution, in which it seems that national psychology has a very reduced part to play. But when dealing, for instance, with the *ultra vires*

doctrine and its link with the notion of juristic personality, we have noticed a vast amount of irreductibility between English and continental points of view. There is conclusive evidence of the futility of a legislative policy based solely on comparative jurisprudence.

We had better emphasise another objective of our science. This one is the discovery of the permanent elements that lie at the bottom of a specific institution common to several countries having reached the same level of juristic civilisation. These permanent elements are similar to what are called 'constants' in mathematics. In matter of companies, the 'constant' of the legal personality, for instance, rises out of the fact that every country is in need of some fiction to enable the company to get its autonomy vis-á-vis its members. The phenomenon of incorporation is present everywhere, but the technical process of incorporation differs according to the system of law in force in a specific country.

A quest for these 'constants' should reveal the most profound tendencies of mankind in the field of law. And it should pave the way towards another objective of comparative jurisprudence, I mean to say the discovery of the basis for a scientific legal philosophy. There, indeed, is the crowning summit of our science, but in order to reach that remotest of goals, the unremitting efforts of many generations of lawyers would be required.

PROPOSITIONS ABOUT LAW

B. E. King

Propositions about law result from thought about law, which is the business of jurisprudence. We shall be concerned with those propositions in which jurisprudence formulates its most general conclusions. Such propositions are expressed in statements or sentences of the general grammatical form ' Law is " so and so " ', or more briefly, ' Law is " X " '. By propositions about law we shall mean propositions, statements or sentences in this form. Similarity in form does not, however, necessarily imply similarity of logical function, any more than the use of the same word, ' law ', is a guarantee that the same ' thing ' or ' entity ' is being referred to. Our propositions may in fact have etymological, defining, explanatory and/or emotive functions. To distinguish and to clarify these functions is the purpose of this article.

Propositions *about* law must be distinguished from propositions *of* law, or legal propositions. These result from legal thought and formulate legal knowledge or the conclusions of legal science. They are expressed in statements which purport to be statements *of* law, or statements of legal rules, or to be themselves legal rules, or to be themselves law,—not merely statements *about* it. The sole function of such propositions or statements is to convey knowledge of the law—or, if knowledge is too strong a term, opinions purporting to be the best available substitute for knowledge. Legal propositions are of three types,[1] but only those stating substantive rules of law will here be considered. The general logical form of such statements is disputed. The Imperative or Austinian school would construe them as commands with sanctions attached in the form ' Thou shalt not do X (act or omission) on penalty of suffering Y (sanction) '. The American Realist school agrees with the Viennese ' Pure ' school in construing them as hypothetical or conditional judgments in the form ' if X (act or omission) then Y (sanction) '.[2] But whereas the

[1] It is suggested that the three types express or are respectively (1) substantive rules, (2) procedural rules, (3) rules of judicial thought or of the judicial process.

[2] Thus the statements in command form to be found in Acts of Parliament or other authoritative documents would be, to adopt Gray's terminology, mere sources of law and not themselves law or legal rules. It is perhaps preferable to designate such authoritative formulæ, deferred to by the courts, as legal norms,—and they will be so designated in this article. Rules of law will thus be considered to have their sources in legal norms, or in those agencies recognised by the courts as competent to formulate legal norms.

Realists would regard these sentences as statements of fact (or at least judgments as to probabilities or probable facts), the followers of Kelsen would regard them as expressing judgments of value, or 'oughts'. The difference is that between the sentences 'If A does X then the courts *will probably* authorise the application of sanction Y' and 'If A does X the courts *ought* to authorise the application of sanction Y'. It must here suffice to say that the writer adopts the Realist view that rules of substantive law are best expressed as (and indeed are) true statements of contingent probabilities, or true statements of possible acts and the probably resultant sanctions.

To go further, the writer would define law as a state of affairs which can, in part, be truly expressed in substantive legal propositions. When there is a state of affairs such that it can be expressed in such statements, then there is law. Law or a legal system exists in society when courts exist whose sanction-authorising activities are reasonably predictable and reasonably effective in that society. When it is the case that if A does X the courts will probably authorise sanction Y we say that a rule of law to that effect exists, and that law or a legal system is functioning in that society. Law may thus be defined as the whole functioning of, or the whole activity in, a society considered in its relation to the consequent reactions of its courts—a state of affairs which may be partly expressed in propositions about those reactions (rules of substantive law) or, what comes to the same thing, propositions asserting the existence of rights, duties, liberties, powers and their correlative notions. Law is in fact society, considered in its relation to the reactions of its courts.[3]

[3] Cf. Collingwood, *The Idea of History*, p. 152. 'The question now arises: What is the difference between such forms of thought as history and science? Each is an attempt to envisage reality (that is, experience) from a particular point of view, in terms of a particular category. History is the way in which we conceive the world *sub specie præteritorum*. . . . Science is the way in which we conceive the world *sub specie quantitatis*'. Similarly law is the way in which we conceive the world, but especially human activity, in its relation to the probable reaction of courts. To conceive the world in this way is to indulge in legal thought, which like history and science, is a distinctive mode of experience. Oakeshott states this idea by saying that whereas philosophy is experience itself, history and science and so forth are 'modes of experience'. 'Experience is modified . . . by arresting it at a certain point and there, using the point of arrest as a fixed postulate or category, constructing a "world of ideas" in terms of that postulate. . . . It is not, however, a "world of mere ideas". It is . . . the world, as seen from that fixed point in experience, and therefore, subject to that qualification, rightly seen': *ibid.*, p. 153. The postulate of legal thought is of course the existence of a court or system of courts whose reactions to events are reasonably predictable. Any system of law is the world seen in its relation to those reactions and expressed in legal propositions. [See also the writer's article on the 'Concept of Law' in C.L.J., Vol. 10, No. 3, 1950, at pp. 428, 429. Law is, however, there conceived as consisting of legal rules rather than as the state of affairs expressed in legal propositions. There are three types of such propositions (see note 1), but in this article it is only necessary to consider those expressing rules of substantive law.] The affinities between this view and the view of the Viennese school

It will hardly have escaped notice that the writer has passed from considering the form of propositions of law to formulating propositions about law. The transition is a natural and indeed an inevitable one. What a proposition of law is cannot be fully explained without stating or assuming what law is, *i.e.*, without stating or assuming a proposition in the form ' Law is X '—with defining functions. No consideration of propositions of law, as such, can be complete without at least one proposition about law.

The converse is also true. No proposition about law can be formulated without some notion of what law is,—and such a notion can hardly now be conceived by a blank mind *in vacuo*. One must at least begin by examining the current use of the expressions law and legal. If one does so one is immediately struck by the fact that few people have any difficulty in knowing what is the law, or what are legal rules, while the questions ' what is law?' and ' what are legal rules?' receive the most diverse and mutually inconsistent answers. A method begins to suggest itself. If people have no difficulty in knowing what are legal rules, they must have, even though they be unable to make it explicit, some vague notion of what legal rules are—what Clark calls an unconscious definition (*Practical Jurisprudence*, Chap. I). This notion must in turn imply some vague notion of what law is. Can notions about the nature of legal rules be detected as implicit, latent or presupposed in the minds of those who seem to know them? If so, then similar notions of law may also be discoverable. Thus at least one approach to notions, and therefore propositions, about law lies through consideration of legal propositions. It is through such a consideration that the writer has arrived at the notions of legal rules and of law which have been given above.[4] It is submitted that these notions or concepts are in fact presupposed by current legal terminology and current legal thought, and that the ' state of affairs ' or ' system of possible, probable and actual occurrences ' referred to by these notions are the best or most useful ' things ' to call respectively legal rules and a legal system or ' law '.

will be obvious. In legal thought as here defined the postulate of an active court replaces the postulate of a ' basic norm ', and the latter becomes the postulate of ' judicial thought ' as the term is used in note 10, *infra*.

[4] If I go to my solicitor and inquire, ' may I safely do so and so?', he is likely to reply, ' Yes, you have a legal right (or liberty) to do it ', or alternatively ' No, you have a legal duty to refrain '. He seems to be assuming the existence of a legal rule, or the existence of a liberty or duty. In either case he seems to have considered my act in relation to the probable reactions of a court, favourable or unfavourable, and the ' existences ' he assumes seem to be no more than the probability of these reactions.

At this point we may return to the main topic of this paper—the differing functions of propositions in the form 'Law is X'. One function is the defining function, and that is to identify as precisely as possible the most useful 'thing' or 'entity' to call law. That this is the function of a definition has been argued in the writer's article on the 'Concept of Law' in C.L.J., Vol. 10, No. 3, 1950, at p. 423, though the definition outlined here pushes analysis of the concept a little deeper than was then suggested (see note 3, *ante*). Another function is explanatory. But this cannot be intelligibly performed until there has been a definition of the 'thing' to be explained. Intelligible explanation presupposes clear definition, and it is seldom that one proposition in the form 'Law is X' can adequately perform both functions. There are many propositions which are clearly about law of which it may be truly said that it is by no means clear what it is that they are about. In such a situation it is as well to consider whether the proposition is primarily about the word 'Law', the concept 'Law', or a 'thing' to be called 'Law'.

The word law has an interesting etymology which was exhaustively discussed by Professor Clark in his book on *Practical Jurisprudence*. Propositions dealing with this topic may be said to have etymological functions, and are readily distinguished. 'Law is derived from the root LAKH.' Such propositions are about the word 'Law' and are seldom liable to be misconstrued. No one would interpret the above statement as supporting the theory that law is not made but grows. More difficult are propositions which appear to express at the same time a meaning of the word and the concept, and to offer an explanation of a thing. Anyone who has read a book on Jurisprudence, Legal Theory, or Legal Philosophy will know that their name is legion. Such a proposition is Aristotle's dictum 'Law is reason unaffected by desire'. If one wished to understand Aristotle one would have to examine his proposition in its context. This might, or might not, make his meaning clear. But our object now is to use the proposition, standing by itself, as illustrating the different possible interpretations, and the different functions, of propositions in the form 'Law is X'.

We can proceed by considering alternatives. It goes without saying that the same procedure is applicable to Austin's 'Law is the command of a Sovereign power', or any similar proposition.

If Aristotle is attempting to define the meaning of the word or concept, the question arises whether the definition is intended to be merely nominal or intended to have application. If all Aristotle is

saying is that when he says 'Law' he means 'reason unaffected by desire', the only valid objection we can make is that we see no point in it. Were we to object 'in that case there is no such thing as law' he could legitimately reply that he never said there was. He was defining law as one might define a fairy or a unicorn, referring to the word or concept only without suggesting that it had any application, that it applied to anything, or that any 'existent' was involved. If, however, he intended to formulate an existential proposition in addition to a definition—that is, if he intended a definition with application—we are entitled to ask where and in what sense does the 'thing' referred to exist? Here Aristotle may reply 'in the realm of ideas, and in the sense that it is cognisable by the intellect', or 'on earth, and in the sense that its existence may be observed and verified by sense-experience'. In the first case we may rejoin that he is being too philosophical for our liking and that, with the logical positivists, we suspect his reply of being 'literally meaningless' or 'strictly nonsensical'; in the second that we don't agree with him and suspect his existential proposition of being just false—at least with regard to most times and places. The defining functions or properties of his proposition are thus either useless, 'unverifiable', or 'non-existent'.

But Aristotle may be presupposing a definition of law and attempting an explanation of a thing previously defined. If that definition is known to us and is clear and precise—and anything like the definition we have suggested—we can retort with confidence that he is talking vague bunkum. That is if he is suggesting a full, complete and universal explanation of law-as-we-conceive-it. If he is suggesting a partial explanation only we may agree that he throws some vague light on the nature of law in certain times and places—though not very much. The explanatory function of his proposition is negligible.

Aristotle's proposition may have, however, yet another function. It is a vaguely inspiring proposition—but it can only serve as an inspiration to one who has a vague notion of law and already conceives himself as responding in some way to what he regards as law—*i.e.*, as applying it, teaching it, decreeing it, respecting or obeying it. If such a person adopts Aristotle's notion as his own, or identifies it with his own, then Aristotle's proposition will influence his responses. A judge who thinks of himself as applying law, a professor who thinks of himself as teaching law, a legislature which thinks of itself as decreeing law, a subject who thinks of himself as obeying law—all these may be influenced in their actions by Aristotle's proposition. This is what is meant by its emotive

functions.[5] Propositions whose importance are derived from having these functions may be said, like nominal definitions, to refer primarily to the concept of law.

Happy is the legal system where teachers and judges respond as one to a proposition 'Law is X' which makes it clear whether professor or Supreme Court is the infallible authority. There is then no split between law in books and law in action such as occurred with Roman Law in mediæval Europe[6]—and has been known to recur in more modern times. Happy the State where legislators, subjects and judges react appropriately to the same emotive concept of law. It may be possible to carry on though the Lord Chancellor think law the embodiment of all that's excellent and the subject think it an ass; but if the legislator conceive it as sovereign command, the courts as decree of nature, and the subject as a capitalist instrument of oppression and class war—there is probably trouble in store. Throughout history concepts of law have played their part in ideological warfare, even though this term is of modern invention. This may be seen in the speech of Demosthenes commending the law to the Athenian jury, in the polemics between the respective supporters of Pope and Emperor, in the constitutional conflicts of the Stuart period, in the Wars of Religion with their denunciation of tyrants and appeals to 'higher' law, in the codification controversy in nineteenth-century Germany and the fight between the welfare State and the Supreme Court of the U.S.A. Today one hurls concepts of law and of the rule of law at totalitarian States and one's own executive. Even at the 'Pure' school of law for daring to stand aside from the ideological conflict. A good example is Professor Jerome Hall's new work on *Living Law of Democratic Society*, which is reviewed elsewhere in this number. Here law is redefined so as to include in its essence the fundamental principles of the American Constitution. One more step and those who support law will be required to combat Socialism—to make the world safe for 'law'.

So far nothing has been said about ideals. Sentences stating what law ought to be express either (i) propositions about what rules of law should say, or (ii) propositions about something which

[5] There is probably no single proposition which has engendered so much respect for 'law' as Aristotle's proposition. But it may well be doubted whether the 'thing' respected was always the thing intended to be referred to by Aristotle. When he contrasted the rule of law with the rule of men, did he intend to engender respect for the commands of a Sovereign power? It is possible that his real meaning is best expressed as follows—'When men are ruled by reason unaffected by desire, then and then only can we say that law exists and that men are ruled by law'. He might well regard contemporary civilisation as completely lawless.

[6] See Jones, *Historical Introduction to the Theory of Law*, at p. 14.

should exist but which law-as-it-is is not. Thus the sentence 'Law ought to be the embodiment of reason' may mean either that rules of law-as-we-conceive-it should be reasonable or that law-as-we-conceive-it should be abolished and be replaced by a rule of reason without resort to force. Such a happy eventuality was indeed expected by those Marxist theorists who expected law and the State to wither away in a classless society. Both classes of propositions may be regarded as propositions about law, though not as propositions about what law is—and it is to propositions of this latter class that we have restricted this article. But consideration of ideals leads us to an important point. It is obvious that propositions expressing ideals have emotive functions similar to propositions purporting to express facts about law. Not so obvious is the fact that the latter are more effective for the very reason that they do not purport to express ideals. It is suggested that Aristotle would have been less influential had he said 'Law *ought to be* reason unaffected by desire', just as Savigny would have cut less ice had he said that law *ought to be* the expression of the Volksgeist. Thus the perspicacious propagandist should express his ideal as a statement of fact.[7] Perhaps examples will have been suggested by the paragraph above. Such examples are examples of the function of 'myths'—*i.e.*, to turn valuations into facts.[8] In this sense many propositions in the form 'Law is X'—from Plato through Cicero, the Christian fathers and Aquinas to Kant and Hegel—and thence to the present day—may be designated myths. This is to emphasise rather than to decry their importance—beneficial or otherwise.

The different functions of propositions about law may be explained in another way, *i.e.*, by considering the questions to which they may be regarded as supplying answers. These questions may often be in the same grammatical form 'What is Law?'—but here again the same form is a mere garment which may be worn by, and perhaps confuse, a number of logically distinct questions. Again we can proceed by consideration of alternatives, and again

[7] It is hardly fair to accuse Continental legal philosophers of doing this deliberately. Nor is it true to say that they tend to confuse what ought to be with what is. It is more accurate to suggest that the Anglo-Saxon jurist is more ready to admit that law ought to be what the Continental jurist says it is, than to agree with him. They tend to regard different 'things' as law—or, more accurately, the connotation of the terms Recht and droit differ too widely from the connotation of the term law to be brought into line with it by the addition of the qualifications 'positives' or 'positif'. Positives Recht is more accurately translated as 'positive right' than as 'positive law'.

[8] See MacIver, *The Web of Government*, at p. 39. 'Myth is the all-pervading atmosphere of society, the air it breathes. One great function of myth is to turn valuations into propositions about the nature of things. . . . In this way it ratifies values, attaching them to reality.'

we may find it convenient to ask whether the question relates primarily to the word 'Law', the concept 'Law' or a thing to be called 'Law'.

No difficulty arises when the question relates solely to the word, and an answer giving its etymology, which may be true or false, suffices. Nor where a definition of law has already been given, and the question asks for an explanation of a thing previously defined. Here the explanation may be true or false, complete or incomplete. To be satisfactory it must at least be definite and verifiable, though it may be doubted whether it can ever be complete—at any rate in a single formula in the form 'Law is X'. Yet even vague and speculative explanations may be interesting—and throw some light—always assuming that we already know what it is on which the light is intended to fall. The trouble arises with questions asking for definitions.

If one is merely asking for the meaning of the word or concept as used by a particular person or in a particular context the correct reply may be a nominal definition which applies to nothing, *e.g.*, Law is the will of Zeus. Here the reply given may be correct, but the proposition is only true of the meaning-of-the-word-law-as-used-by-whoever-used-it. Thus the criteria of truth or falsity to be applied to merely nominal definitions is a peculiar one. One is entitled to define one's own terms. If on the other hand the question means 'what is really law?' the only correct reply is that the question is nonsensical. Things may be real, but they are not really anything until men have named them. Even Jehovah employed Adam's services for the naming of the beasts.[9] If the question is now reformulated so as to mean 'what is commonly called law?' the answer may, in principle, be true or false. If attempted it will probably be false, as there is much difference of opinion on the point.

The last two questions required an answer indicating a 'thing' —that is, they ask for a real definition. There are further questions asking for such. 'What is properly called law?' But this requires a preliminary and difficult decision on the standard of propriety. If utility is adopted as the standard there still remains the question 'utility for what purpose?' But it may be suggested that a definition will be useless for any scientific purpose unless it refers clearly to a 'thing' or entity which exists in the sense that its existence can be verified by sense experience. It is useless for such purposes if it is vague, or if it refers precisely to an unsuitable 'thing'. It

[9] *Book of Genesis*, Chap. II, v. 19, '. . . and whatsoever Adam called every living creature, that was the name thereof'.

may further be false if it purports to refer to an existing thing which does not in fact exist.

This does not mean that answers or propositions about law may not be useful for non-scientific purposes, even though they be vague, metaphysical or literally meaningless. They may yet supply the concept in fact required by the question asked. Though objectively meaningless they may yet be capable of subjective interpretation or of arousing an emotional response. The question 'what is law?', when asked by a person already conceiving himself as responding in some way to law, is a request, not for truth, but for guidance. Such is the question asked by the judge who conceives himself as required to apply law. When a judge asks 'what is law?' he does not stay for or require an objective truth. He is merely seeking a concept which he can interpret as telling him what to do—and then he does it. What he does will be determined by his concept of law—by the proposition about law which he accepts. Its significance lies in its emotive function, in its adoption as a guide to action. Its truth or falsity is immaterial, and in fact does not arise. To set up any standard to determine its truth is to mistake it for the answer to a question which was never asked.

To sum up we may suggest that intelligent criticism of propositions in the form 'Law is X' depends on an understanding of the different functions such propositions may perform and the ascertainment of which of these functions they are in fact intended by their authors to perform. In history these functions have not always been identical. In particular we may note that propositions whose defining or explanatory functions are of negligible or even negative utility have had emotive functions of vast importance. Such are most of the propositions about law entertained by English judges. Their notions of law are seldom of assistance to the logical analyst, but they have had a decisive influence on the contents of the English Legal System. In fact the sources of law in any time or place cannot be other than those indicated by the current 'judicial concepts' of law,[10] or by the propositions in the form 'Law is X' which are accepted by the courts.[11]

[10] The term 'sources of law' is used here to mean those agencies recognised by the courts as competent to formulate legal norms (see note 2). While these agencies, which vary with time and place, are indicated by the general concept of law postulated by current judicial thought (or, in Kelsen's terminology, by the 'basic norm') it is not intended to suggest that this thought is completely autonomous. Discussions of 'the nature of law' may be regarded as discussions of the factors which determine judicial thought—stark power, reason, national consciousness, philosophical theories, economic interest, the need for stability, the need for change, and so on.

[11] It is suggested that this may explain why Professor Allen, in *Law in the Making*, can give so accurate a reflection of judicial thought on the sources of law without once attempting a clear and precise definition of his subject-matter.

THE PREROGATIVE WRITS

S. A. DE SMITH

THE object of this paper is to give a general account of the nature and development of the prerogative writs.[1] Of these writs the best known are *habeas corpus ad subjiciendum*, to bring up the body of a person imprisoned on a criminal charge or in private detention; *certiorari*, to review orders and convictions of inferior tribunals and to remove indictments for trial; prohibition, to prevent inferior tribunals from going beyond their jurisdiction; and *mandamus*, to compel the performance of a public duty. All four are of high constitutional importance, and the last three in particular play a central role in administrative and magisterial law. In the common-law jurisdictions overseas their significance is not less than in England, and in some instances it is even greater because of the more extensive spheres of operation conferred upon them. In England an Act of 1938 [2] replaced the prerogative writs of *certiorari*, prohibition and *mandamus* by orders of the same names, but the change of designation reflected only a simplification of procedure [3]; the substantive law remains the same, and for convenience they will here be described as if they were still prerogative writs.

What is a prerogative writ? The name indicates that it is a writ especially associated with the King.[4] Most modern writers have said that prerogative writs are writs which originally were issued only at the suit of the King but which were later made available to the subject. This view cannot be accepted without a number of reservations. Prohibition and *habeas corpus* appear to have issued on the application of subjects from the very first; and although writs of *certiorari* and *mandamus* were initially royal

[1] For the only other general account, see E. Jenks, 'The Prerogative Writs in English Law' (1923) 32 Yale L.J. 523. This article, although sometimes inaccurate, contains several valuable suggestions.

[2] Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 & 2 Geo. 6, c. 63).

[3] The Act left *habeas corpus* inviolate as a prerogative writ with the old procedure; it was apparently thought that to meddle with *habeas corpus* might be misconstrued as subversive activity: R. M. Jackson, *Machinery of Justice in England*, 37. 'Never change native names, for there are Names in every nation God-given, of unexplained power in the mysteries' (Chaldean Oracle).

[4] Of course, all writs are in form commands issuing in the name of the King; but only writs that were conceived as standing in a *special* relationship with the Crown came to be regarded as 'prerogative' writs.

mandates issued for diverse purposes of government, their earliest use in judicial proceedings seems to have been to rectify wrongs done to subjects. It is nevertheless true to say that when, in the seventeenth and eighteenth centuries, these various writs came to be called 'prerogative', it was because they were conceived as being intimately connected with the rights of the Crown. The nature of that connection will be discussed at a later stage.

The theory that prerogative writs were in origin writs peculiar to the King himself is valid only with respect to certain obsolete and obsolescent writs.[5] They include:

(a) The writ *de non procedendo rege inconsulto*, a 'writ of prerogative'[6] by which the King intervened to withdraw from the cognisance of the common-law courts proceedings in which he claimed to have an interest. James I's use of the writ in *Brownlow's Case*[7] was successfully resisted by Coke and his fellows, in spite of Bacon's brilliant argument in support of the prerogative.[8] Coke's attitude in that case made a decisive clash with the King inevitable, and a year later he was removed from the Bench. After Coke's dismissal the King employed more informal methods for putting pressure upon the judges, and the writ fell into desuetude.

(b) *Scire facias* for the purpose of rescinding royal grants, charters and franchises. It seems to have often been obtained by subjects in the sixteenth century,[9] but the rule was established that the Attorney-General's fiat had first to be granted.[10] The writ is now almost obsolete, but it appears to have escaped the fate of other forms of *scire facias* which were abolished by the Crown Proceedings Act, 1947.[11]

[5] It is often said that *quo warranto* (which is usually classified as a prerogative writ: *e.g.*, 2 Pollock & Maitland 661), was only made available to the subject in modern times, but this view is wrong: Plucknett, *Legislation of Edward I*. 35 f. Under Edward I it became a potent royal weapon against the usurpers of franchise jurisdictions, but it had been used by private suitors long before that time: see Helen M. Cam (1926) 11 *History*, 143 f.; G. Lapsley (1927) 2 *Cambridge Historical Journal*, 110 f. In the sixteenth century it was replaced by an information filed by the Attorney-General. As with some of the prerogative writs, subjects required leave of the court to exhibit the information. Section 9 of the Administration of Justice Act, 1938, replaced *quo warranto* informations by injunction.

[6] 3 Bulst. 32 at 33.

[7] (1615) 3 Bulst. 32; Moo.K.B. 812; 1 Rolle R. 188, 206, 288. The political background to the case is described by S. R. Gardiner, *History of England, 1603–42*, iii, 7, and Holdsworth, *H.E.L.*, v. 439.

[8] Bacon, *Works* (ed. Spedding), vii, 687 f.

[9] 17 Viner *Abridgment*, Prerogative of the King, U (*b*).

[10] For the modern law, see Robertson, *Civil Proceedings by and against the Crown*, 537; *R.* v. *Hughes* (1866) L.R. 1 P.C. 81; *Eastern Archipelago Co.* v. *R.* (1853) 2 El. & Bl. 856.

[11] Crown Proceedings Act, 1947 (10 & 11 Geo. 6, c. 44), Schedule I; Bickford Smith, *Crown Proceedings Act, 1947*, 108.

(c) *Ne exeat regno*, a writ restraining the subject from leaving the Kingdom.[12] It issued out of the Chancery as of course when applied for on behalf of the Crown,[13] but the subject (to whom it was made available in the sixteenth century [14]) had to show cause by motion or affidavit why he should have the writ, and until 1700 the court had an unfettered discretion to refuse it to him.[15] Lord Eldon called it 'a high prerogative writ' which was 'applied to cases of private right always with great caution and jealousy'.[16] Today it issues only under the provisions of section 6 of the Debtors Act, 1869.[17]

Since this survey is concerned with the living rather than with the dead or moribund, only the four main prerogative writs will be further considered. We shall attempt to explain how the term 'prerogative writ' came into general use and why each of the four writs was assigned to the prerogative group. Something will be said of the history and special characteristics of *certiorari*, prohibition and *mandamus* in turn; *habeas corpus* will not be treated separately, as accounts of its history are readily accessible.[18] But before the writs are discussed individually, the general characteristics common to all or most of them will be described. These characteristics are as follows:

(a) They are not writs of course; they cannot be had for the asking, but proper cause must be shown to the satisfaction of a court why they should issue.

Even in the early formative period of the common law a distinction was recognised between writs of course (writs that had acquired a common form and could be purchased by or on behalf of [19] any applicant from the Royal Chancery) and other writs. The term 'writs of course' was used in relation to Henry III's *Register of Writs* compiled in 1227 and sent to Ireland,[20] and it occurs in the Provisions of Oxford (1258) [21] and in Bracton's

[12] For its history, see Beames, *Ne Exeat Regno* (2nd ed., 1824).
[13] Bacon, Orders, No. 89 (Sanders, *Orders in Chancery*, i, 120).
[14] Beames, *op. cit.*, 18–19.
[15] Bohun, *Cursus Cancellariae* (2nd ed.) 455.
[16] *Tomlinson* v. *Harrison* (1802) 8 Ves. 32 at 33; cf. *Jackson* v. *Petrie* (1804) 10 Ves. 164 at 165.
[17] 32 & 33 Vict. c. 62; see also Crown Proceedings Act, 1947, s. 31 (2), and Glanville Williams in (1948) 10 Camb.L.J. at 70, n. 31.
[18] See Holdsworth, *H.E.L.*, x, 108–125; Maxwell Cohen (1938) 16 Can.Bar Rev. 92. (1940) 18 Can.Bar Rev. 10, 172; Jenks (1902) 18 L.Q.R. 64 (reprinted in 2 *Select Essays in Anglo-American Legal History* 531). Holdsworth and Cohen have exposed several misconceptions in Jenks' account.
[19] G. O. Sayles, Introduction to Vol. 57, Selden Soc., lxxxvii.
[20] See Maitland, 'History of the Register of Original Writs', *Collected Papers*, ii, 110 at 130. This monograph also appears in (1889) 3 Harv.L.R. and 2 *Select Essays* 549.
[21] *Ke il* [the Chancellor] *ne enselera nul bref fors bref de curs sanz le commandement le rei, e de sun cunseil ke serra present.*'

treatise.[22] Bracton contrasts *brevia de cursu* with *brevia magistralia*; the latter were writs of grace. It is not known whether any of the modern prerogative writs were then regarded as writs of grace[23]; but if we leap over the centuries to the later years of Elizabeth's reign, we find some coincidence between writs of grace and what were soon to be called prerogative writs. The anonymous author of *A Treatise of the Maisters of the Chauncerie*[24] equates writs of grace with writs magisterial, and says that they ought properly to be awarded only by the Masters. As examples of such writs he mentions *subpœna*, *certiorari* and *ne exeat regno*. The Masters, as men learned in the civil and canon law, were also suited to the awarding of prohibitions to ecclesiastical courts; and he laments that these have come to be composed by others 'cunninge in the secular lawe onely'.[25] When Bacon became Chancellor he issued a number of Orders designed to cure the laxity prevalent in the Chancery. One of these[26] directed that no writs of (*inter alia*) *ne exeat regno*, prohibition or *habeas corpus*, or certain forms of *certiorari*, were to pass without warrant under his hand. The primary object of this reform was to check abuses of legal process by dishonest and vexatious persons whose machinations were bringing the administration of justice into disrepute. Parliament had indeed already made several attempts to erect safeguards restricting the issue of writs of *habeas corpus* and *certiorari*.[27] But it seems clear that Bacon's reform had another object: that of maintaining the principle that writs closely associated with the rights of the Crown should not issue out of the Chancery to the subject as of course.[28]

By the time of Charles II applications for *habeas corpus*, *certiorari* and prohibition were usually made to the Court of King's Bench rather than to the Chancery,[28a] and *mandamus* was awarded

[22] *De Legibus*, f. 413b.

[23] One of the earliest writs of grace was *de odio et atia*: Glanvill, xiv. c. 3. Magna Carta, c. 36, converted it into a writ of course. For early references to writs of grace in parliamentary petitions, see *Rotuli Parliamentorum* (*Rot.Parl.*), ii, 376, 241.

[24] Written c. 1596–1603; printed in Hargrave's *Law Tracts* 293.

[25] *Op. cit.* at 313.

[26] No. 85; cf. Orders of Puckering and Egerton (1596): Sanders. *op. cit.*, i, 70.

[27] See (1414) 2 Hen. 5, St. 1, c. 2; (1433) 11 Hen. 6, c. 10; (1554) 1 P. & M., c. 13; (1601) 43 Eliz. c. 5.

[28] It has been said that *habeas corpus ad subjiciendum* (the prerogative form of *habeas corpus*) was never regarded as a writ of course: Wilmot, *Opinion on the Writ of Habeas Corpus* (1758) at 88. It was decided in the seventeenth century, however, that other forms of the writ would issue out of the common law courts as of course: *Slater* v. *Slater* (1660) Lev. 1; *Penrice and Wynn's Case* (1679) 2 Mod. 306; *Anon.* (1671) Cart. 221.

[28a] The history of the assumption by the common-law courts of the power to award the writs still awaits detailed investigation; but Jenks was clearly wrong in saying that the development took place after 1688.

almost exclusively out of the King's Bench.[29] The writs issued only upon cause shown by motion when applied for by the subject, but the Crown would have a *certiorari* to remove an indictment as of course.[30] This distinction between applications on behalf of the Crown and applications by the subject—a distinction already noted in connection with *ne exeat regno*[31]—derived from a conception that the writs were in a special sense the King's own writs.

(b) The award of the writs usually lies within the discretion of the court.

The court is entitled to refuse *certiorari*[32] and *mandamus*[33] to applicants if they have been guilty of laches or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty. On applications by subjects for *certiorari* to remove indictments the courts have always exercised a very wide discretion.[34]

The fact that some of the prerogative writs were discretionary came to be directly linked with their designation as prerogative writs. Thus, in one case, it was said: 'An application for *mandamus* is an application to the discretion of the court; a *mandamus* is a prerogative writ and is not a writ of right'.[35] But although none of the prerogative writs are writs of course, not all are discretionary. Prohibition, for example, issues as of right in certain cases[36]; and *habeas corpus ad subjiciendum*, the most famous of them all, is a writ of right which issues *ex debito iustitiæ* when the applicant has satisfied the court that his detention was unlawful.[37] These two writs, therefore, are not in the fullest sense writs of grace.

[29] In *Awdley* v. *Joy* (1626) Poph. 170 it was called 'peculiar to the King's Bench' and 'one of the flowers of it'. See, however, *Mayor of Coventry's Case* 2 Salk. 429 for a reference to *mandamus* issuing out of the Chancery.

[30] *Adrian Lampriere's Case* (1670) 1 Mod. 41.

[31] *Ante*, p. 42; cf. also the restrictions on the right of subjects to have the prerogative writ of *scire facias*, and to exhibit *quo warranto* informations.

[32] For an authoritative modern statement of the law, see *R.* v. *Stafford JJ., Ex p. Stafford Corporation* [1940] 2 K.B. 33.

[33] See, however, *R.* v. *Bishop of Sarum* [1916] 1 K.B. 466.

[34] See, *e.g.*, *Anon.* 1 Sid. 54, where the court resolved not to award *certiorari* to remove indictments for perjury, forgery, or 'ascun tiel grand misdemeaner' because where indictments were thus removed they were not further prosecuted.

[35] *R.* v. *Commissioners of Excise* (1788) 2 T.R. 381 at 385; see also *R.* v. *Churchwardens of All Saints, Wigan* (1876) 1 App.Cas. 611 at 620; High, *Extraordinary Legal Remedies* (1874) 8, n. 1; Goodnow, *Comparative Administrative Law*, ii, 195.

[36] Short and Mellor, *Crown Practice* (2nd ed.), 254–5; Halsbury (Hailsham ed.) ix, 819–20, 826–8; Shortt, *Informations, Mandamus and Prohibition*, 441–6. The law on this point is not altogether clear. For early conflicts of opinion, see Bacon, *Abridgment*, Prohibition (B).

[37] *Jenkes' Case* (1676) 6 St.Tr. 1189 at 1207–8; *Hobhouse's Case* (1820) 3 B. & A. 420.

(c) They were awarded pre-eminently out of the Court of King's Bench.[38]

(d) At common law they would go to exempt jurisdictions (*e.g.*, the Counties Palatine, the Cinque Ports), to which the King's writs did not normally run.

The significance of these two characteristics will be further considered after we have discussed the writs of *certiorari*, prohibition and *mandamus*.

Certiorari[39] was essentially a royal demand for information; the King, wishing to be certified of some matter, orders that the necessary information be provided for him. Thus, the King wishes to be more fully informed of allegations of extortion made by his subjects in Lincoln, and therefore appoints commissioners to inquire into them.[40] *The Calendar of Inquisitions* mentions numerous writs of *certiorari*, addressed to the escheator[41] or the sheriff, to make inquisitions; the earliest are for the year 1260.[42] When Parliament grants Edward II one foot-soldier for every township, the writ addressed to the sheriffs to send in returns of their townships to the Exchequer is a writ of *certiorari*.[43] It was, in fact, one of the King's own writs, used for general governmental purposes. Very soon after its first appearance it was used to remove to the King's Courts at Westminster the proceedings of inferior courts of record. In 1271 the proceedings in an assize of darrein presentment are transferred there because of their dilatoriness.[44] In a later case in the same term[45] the writ does not specify the reasons for removal; the case is removed simply because the King wishes '*certis de causis*' to be certified of the record and process. The same phrase appears later in the writs used for summoning defendants before the Chancellor and the Council.[46] Although complaints were often raised that commands issued 'for certain

[38] Proceedings upon the writ *ne exeat regno* were confined to the Court of Chancery.

[39] The word is not, apparently, of classical origin: Du Cange, *Glossarium Mediae et Infimae Latinitatis*, Vol. 2. The first example of its use that I have traced in the printed records is in a letter written in 1252, from Henry III to the Mayor and commonalty of Bordeaux, expressing the King's readiness to be informed of the grievances of his subjects in that city: *Close Rolls*, 36 Hen. 3, m. 27d. The word *certificari* was more common at that time.

[40] *Placitorum Abbreviatio* (*Plac.Abbr.*) 155 (49 Hen. 3).

[41] Cf. *Register of Original Writs*, ff. 293, 296; for history of the escheator, see *The English Government at Work*, 1327–36 (ed. Morris and Strayer), ii, 109–67.

[42] *Calendar of Inquisitions*, i, 130, 131.

[43] *Inquisitions and Assessments Relating to Feudal Aids*, i, 16; see also Introduction, xxiii.

[44] *Plac.Abbr.* 182, r. 14 (Hil. 56 Hen. 3).

[45] *Ibid.*, 184, r. 23d.

[46] For a general discussion, see Plucknett, *Concise History of the Common Law* (4th ed.) 645.

reasons' were issued for oppressive reasons,[47] the use of the indefinite formula in writs of *certiorari* seems to have evoked no protests, and the phrase continued until 1938 to appear in modern forms of the writ.

From about 1280 the writ was in common use,[48] issuing on the application of ordinary litigants. Sometimes it was in the nature of a writ of error; sometimes the proceedings at Westminster were in effect general appellate proceedings. The breadth of the issues that could be raised is amply illustrated in the volumes of King's Bench Cases for the reign of Edward I, edited by Professor G. O. Sayles.[49] The conception then prevailing was well expressed in a modern Canadian case: 'The theory is that the Sovereign has been appealed to by some one of his subjects who complains of an injustice done him by an inferior court; whereupon the Sovereign, saying that he wishes to be certified—*certiorari*—of the matter, orders that the record, etc., be transmitted into a court in which he is sitting'.[50] Much of this very broad remedial jurisdiction passed from the courts of common law to the Court of Chancery, and in the Tudor and early Stuart periods writs of *certiorari* frequently issued to bring the proceedings of inferior courts of common law before the Chancellor.[51] Later, however, the Chancery confined its supervisory functions to inferior courts of equity.[52]

From the fourteenth century until the middle of the seventeenth century the following seem to have been the main purposes served by *certiorari*:

(a) To supervise the proceedings of inferior courts of specialised jurisdiction—*e.g.*, the Commissioners of Sewers, the Courts Merchant,[53] the Court of Admiralty,[54] the Courts of the Forests[55]—particularly in order to keep them within their spheres of jurisdiction.

(b) To obtain information for administrative purposes: *e.g.*, the sheriff is told to find out whether one who has been granted the King's protection is tarrying in the city instead of journeying

[47] See, *e.g.*, *Close Rolls*, 1327–30, pp. 25. 32, 286.
[48] For example of *certiorari* issuing in consequence of petitions to the King in Parliament, see *Rot.Parl.* i, 17b, 18a, 105a.
[49] Selden Soc., Vols. 55, 57, 58.
[50] *R.* v. *Titchmarsh* (1915) 22 D.L.R. 272 at 277–8.
[51] Cowell, *Interpreter*, M2; Spence, *Equitable Jurisdiction*, i, 686, 687.
[52] The proceedings were removed upon a Certiorari Bill: see *Register*, Appendix, 52d; 1 Eq.Ca.Abr. 81; *Hilton* v. *Lawson*, Cary 48.
[53] *Select Cases Concerning the Law Merchant*, Vols. I–III, *passim* (Selden Soc., Vols. 23, 46, 49).
[54] *Select Pleas in the Court of Admiralty*, I (Selden Soc. Vol. 6), 2; Introduction to Vol. II (Selden Soc., Vol. 11), xli.
[55] Nellie Neilson in *The English Government at Work, 1327–36* (ed. Willard and Morris), ii, 422.

forth in the King's service[56]; the escheator must certify into the Chancery the value of knights' fees and advowsons which have escheated to the King.[57]

(c) To bring into the Chancery or before the common-law courts judicial records and other formal documents for a wide diversity of purposes. The *Register of Writs* gives many examples. Thus *certiorari* lies to order the return of securities of the peace, recognisances, annuities, feet of fines, statutes merchant and staple, Acts of Parliament. Judgments of inferior courts are brought up in order that execution may be obtained. Where in proceedings in error diminution of the record is alleged (*i.e.*, where the record of the inferior court is alleged to be incomplete), *certiorari* issues to order the remainder of the record to be returned. The Treasurer and Chamberlains of the Exchequer are ordered to find out whether a manor is held in ancient demesne '*scrutato libro nostro qui vocatur Domesday*'.[58] Records of convictions and outlawries are certified to the King for pardons to be granted.[59]

(d) To remove coroners' inquisitions and indictments into the King's Bench. The use of *certiorari* to remove indictments is of particular interest. In Edward III's time the perambulating Court of King's Bench supervised the newly established Sessions of the Peace by issuing writs of *certiorari* to remove before it all unfinished indictments lying before the Justices in the county it was visiting.[60] In the fifteenth and sixteenth centuries the trial of indictments removed by *certiorari* constituted an important part of the work of the King's Bench.[61] The special position of the Crown in criminal proceedings—'the King has undoubtedly a right to prosecute in what court he pleases'[62]—was reflected in the rule finally established in the seventeenth century that *certiorari* to remove an indictment was a writ of right for the Crown but a writ of grace for the subject.[63] In the eighteenth century it was settled that statutes taking away *certiorari* did not bind the Crown in the absence of express words to that effect, for 'the King has . . . an inherent common law right . . . to have a *certiorari*'.[64]

[56] *Register*, f. 24; cf. Y.B. Hil. 21 Edw. 4, pl. 26.
[57] *Register*, ff. 293, 296.
[58] In 1 Salk. 57 the Book is described as having been brought into court by a porter.
[59] For very early examples, see Selden Soc., Vol. 57, 41 (1291); *Rot.Parl.*, i, 57a.
[60] B. H. Putnam, *Proceedings before Justices of the Peace in the Fourteenth and Fifteenth Centuries* (Ames Foundation, 1938), Introduction, lxx *et passim*.
[61] See figures quoted by Stephen, *History of Criminal Law*, i, 96.
[62] *R.* v. *Clace (Inhabitants)* (1769) 4 Burr. 2456 at 2458 (*per* Lord Mansfield C.J.).
[63] See p. 44, *ante*.
[64] *R.* v. *Berkley and Bragge* (1754) 1 Keny. 80 at 102.

With the vast increase in the duties of the Justices out of Sessions after 1660, *certiorari* acquired a new importance. Not only did Parliament create numerous minor offences punishable summarily,[65] but it heaped new administrative duties upon the Justices and *ad hoc* authorities.[66] It had been decided before the end of Elizabeth's reign that a summary conviction tainted with irregularity or made without jurisdiction could be removed into the King's Bench by *certiorari* and quashed.[67] A century later the scope of *certiorari* was again widened by Holt C.J.'s judgment in the leading case of *Groenvelt* v. *Burwell*, where it was held that the writ would lie to review disciplinary decisions of the censors of the College of Physicians. Holt C.J. said: 'It is a consequence of all jurisdictions to have their proceedings returned here by *certiorari* to be examined here. . . . Where any court is erected by statute, a *certiorari* lies to it . . .'.[68] Thereafter the King's Bench became inundated with motions for *certiorari* to quash rates and orders made by Justices and other bodies exercising administrative functions under semi-judicial forms. It became what Gneist has called an *Oberverwaltungsgericht*,[69] a supreme court of administration, supervising much of the business of local government by keeping subordinate bodies within their legal limitations by writs of *certiorari* and prohibition, and ordering them to perform their duties by writs of *mandamus*. The modern High Court had succeeded to much of this jurisdiction, and there can be no doubt that the absence in the common-law systems of a distinct body of public law, whereby proceedings against public authorities are instituted only before special administrative courts and are governed by a special body of rules, is directly traceable to the extensive use of prerogative writs by the Court of King's Bench.

Prohibition is one of the oldest writs known to the law. From the first its primary function seems to have been to limit

[65] See Felix Frankfurter and Thomas G. Corcoran in (1926) 39 Harv.L.R. 917; and Paley, *Summary Convictions* (9th ed.), Introduction.

[66] Holdsworth, *H.E.L.*, x, Ch. II.

[67] *Gardener's Case* (1600) Cro.Eliz. 821. The case appears in (1591) 5 Co.Rep. 71 *sub nom. Seint John's Case*, but the term, year and name of defendant are given wrongly. The case was removed by a *corpus cum causa*; *certiorari* is not mentioned in the record in the *Rex* Roll, but it was presumably used in conjunction with the *corpus cum causa*. The next case in the *Rex* Roll, *R.* v. *Denys*, was removed by a *certiorari*; the record is transcribed in Tremaine, P.C., 330.

The writ of error was the appropriate means of impeaching the record of a judgment given on an indictment; but it would not lie to quash convictions and orders made by magistrates after summary proceedings, and the courts therefore allowed *certiorari* to issue for this purpose.

[68] (1700) 1 Ld.Raym. 454 at 459. See also *R.* v. *Inhabitants—in Glamorganshire*, 1 Ld.Raym. 580 (the *Cardiff Bridge Case*).

[69] *Englische Verfassungsgeschichte*, 571.

the jurisdiction of the ecclesiastical courts.[70] The example given by Glanvill[71] shows that it would issue at the suggestion of a subject, and the prohibitory clause recites that the suits in question '*ad coronam et dignitatem meam pertinent*'. It later came to be used as a weapon by the common-law courts in their conflicts with the Courts of Chancery and Admiralty.[72] The early history of the writ and its verbal identification with the rights of the Crown help to explain the extravagant language in which later lawyers were wont to describe its qualities. Thus, in *Warner* v. *Suckerman* (1615)[73] Croke J., holding that it would issue to the courts of the County Palatine of Lancaster, said: 'it is *breve regium* and *ius coronæ*, and if this writ shall be denied in such cases, this would be in *læsionem, exhereditationem, et derogationem coronæ*'. The matter was expressed more soberly in another case: 'the King is the indifferent arbitrator in all jurisdictions, as well spiritual and temporal, and [it] is a right of his Crown to . . . declare their bounds' by prohibitions.[74] Disobedience to a prohibition was conceived of as a contempt of the Crown.[75] Since it was 'the proper power and honour of the King's Bench to limit the jurisdiction of all other courts'[76] the writ usually issued out of that court; but it could also be awarded by the Chancery and the Common Pleas.[77]

The 'prerogative' character of the writ has been repeatedly stressed. Fitzherbert says that 'the King for himself may sue forth this writ, although the plea in the spiritual court be betwixt two common persons, because the suit is in derogation of his Crown'.[78] That the protection of private interests is only a secondary function of the writ is brought out in the comparatively modern case of *Worthington* v. *Jeffries*, where it was said that 'the ground of decision in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is whether the royal prerogative has been

[70] Norma Adams, 'The Writ of Prohibition to Court Christian' (1936) 20 Minnesota L.R. 272.
[71] Bk. iv, 14; reprinted in Holdsworth, *H.E.L.*, i, 656.
[72] For many other early uses of the writ, see Fitzherbert, *Natura Brevium* (*F.N.B.*), 39 H *et seq.*
[73] 3 Bulst. 119; see also Skin. 626.
[74] *James' Case* (1631) Hob. 17: 2 Roll.Abr. 313; see also Hale, *Analysis of the Law*, 21. Cf. Foster J. in *R.* v. *Berkley and Bragge*, 1 Keny. 80 at 104: 'It is the undoubted prerogative of the Crown, to see that all inferior jurisdictions are kept within their proper bounds, and on that principle the whole doctrine of certiorari depends'.
[75] Until 1831 (1 Wm. 4. c. 21) a declaration in prohibition had to be expressed to be on behalf of the King as well as the applicant, and had to allege a contempt of the Crown.
[76] *Case of Company of Horners in London* (1642) 2 Roll.R. 471.
[77] Bacon, *Abridgment*, Prohibition (A).
[78] *F.N.B.* 40 E.

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encroached upon by reason of the prescribed order of the administration of justice having been disobeyed'.[79] Hence even a complete stranger to the proceedings in the other court could have the writ.[80]

Although the history and qualities of prohibition well qualified it for inclusion in a 'prerogative' group of writs, the claims of *mandamus* are less obvious. It is true that in early times the King issued countless innominate writs that included the word *mandamus* —'the autocratic head of a vast administrative system will have occasion to "*mandamus*" his subjects many times in the course of a day'[81]—but the connection between most of these royal mandates and the modern judicial writ was verbal only.[82] Moreover, the writs called *mandamus* that appear in the early law books are concerned not with private grievances at all, but with steps to be taken by the escheator or the sheriff in connection with possible accretions to the royal revenues.[83] Not until 1573 do we find a reported case that centres around a judicial writ of *mandamus* serving purposes substantially similar to those of the modern writ[84]; it was issued to restore a citizen of London to his franchise of which he had been illegally deprived. For practical purposes, however, the history of *mandamus* begins with *Bagg's Case* (1615) 11 Co.Rep. 93b. The writ in this case is shown to have issued out of the King's Bench and to have been attested by Coke as Chief Justice; it recited that Bagg, a capital burgess of Plymouth, had been unjustly removed from his office by the mayor and commonalty, and commanded them to restore him unless they showed to the court good cause for their conduct. They failed to satisfy the court and a peremptory *mandamus* issued to restore Bagg. From then onward many such writs issued to compel restitution[85] to offices and liberties. By the

[79] (1875) L.R. 10 C.P. 379 at 382; see also R. T. Walker, 'Is the Writ of Prohibition a Prerogative Writ?' (1939) 37 Mich.L.R. 789; and Note (1923) 36 Harv.L.R. 863.

[80] *Worthington* v. *Jeffries*, *ante*; *De Haber* v. *Queen of Portugal*, 17 Q.B. 220; Co.Inst., ii, 607.

[81] Jenks (1923) 32 Yale L.J. at 530.

[82] See, however, a writ in the *Close Rolls*, 6 Edw. 2, m. 8, commanding the Mayor and commonalty of Bristol to restore certain burgesses to the liberty of that city and to their goods; cf. *Middleton's Case*, *post*. In *Dr. Widdrington's Case*, 1 Lev. 23, there is mentioned a writ of *mandamus* issuing *temp.* Edward II to restore Fellows of a College to their fellowships of which they had been unlawfully deprived; cf. *Tapping on Mandamus*, 78.

[83] *F.N.B.*, 253B; *Register*, 195d.

[84] *Middleton's Case*, 3 Dyer 332b. The writ in this case was modelled after one issued in an earlier unreported case of a similar character: *Anable's Case*, *temp.* Henry VI.

[85] In the seventeenth century the writ was often called a writ of restitution: *e.g.*, 1 Bulst. 174; Poph. 133; Poph. 176; Style 32; 3 Salk. 231; Hale's *Analysis of the Law*, 60.

early years of the eighteenth century it had become—thanks largely to the work of Holt—something more comprehensive than a writ of restitution. It would go, on the application of a party aggrieved, to compel the performance of a wide range of public or quasi-public duties, performance of which had been wrongfully refused. It would issue, for example, to compel the admission (as well as the restoration) of a duly qualified alderman to a corporation,[86] or to compel the holding of an election to the office[87]; and it became a valuable device to prevent the unlawful packing of corporations.[88] More important still, it would issue to inferior tribunals that wrongfully declined jurisdiction.[89] Through the writ of *mandamus* the King's Bench compelled the carrying out of ministerial duties incumbent upon both administrative and judicial bodies. The rules governing the issue of the writ gradually took shape until they were fully stated by Lord Mansfield in a series of cases.[90] What is particularly interesting about Mansfield's judgments is that he persistently refers to *mandamus* as a 'prerogative' writ.[91] Thus, in a typical passage, he calls it 'a prerogative writ flowing from the King himself, sitting in his court, superintending the police and preserving the peace of this country'.[92] Indeed, it is certain that he and Blackstone were responsible if not for the invention of the term 'prerogative writ' at least for its acceptance as part of the lawyer's vocabulary. But if we are to understand their conception of a prerogative writ, we must examine Coke's ideas about the functions of the King's Bench.

Coke began his discussion of the King's Bench by considering Bracton's description of the emergent court[93] as *aula regia* where the King's justices *proprias causas regis terminant*. This jurisdiction belonged peculiarly to the King's Bench, the court held (at one time in reality, but in Coke's time only in theory[94]) *coram rege*

[86] *R.* v. *Mayor of Norwich*, 2 Ld.Raym. 1244.
[87] *R.* v. *Mayor of Evesham*, 7 Mod. 166.
[88] It was regularly used after 1688 by the Whigs to secure admission to the Tory-packed borough corporations. Jenks, in 32 Yale L.J. at 530–1, mentions that the Whigs were being kept off the corporations in spite of the Toleration Act. That Act, however, had nothing whatsoever to do with corporate office.
[89] See, *e.g.*, *Groenvelt* v. *Burwell*, 1 Ld.Raym. at 469; *R.* v. *Montague*, Sess. Cas. 106.
[90] See esp. *R.* v. *Blooer* (1760) 2 Burr. 1043; *R.* v. *Barker* (1762) 1 W.Bl. 352; *Dr. Askew's Case* (1768) 4 Burr. 2186.
[91] *E.g.*, in *R.* v. *Cowle* (1759) 2 Burr. 834 at 855; *R.* v. *Barker* (1762) 1 W.Bl. 352; *R.* v. *V.-C. of Cambridge* (1765) 3 Burr. 1647 at 1659. For a similar early reference to *mandamus*, see *Knipe* v. *Edwin* (1694) 4 Mod. 281; cf. *R.* v. *Patrick*, 1 Keb. 610.
[92] *R.* v. *Barker*, *ante*.
[93] *De Legibus*, f. 150 b.
[94] *Case of Prohibitions* (1608) 12 Co.Rep. 65.

ipso.[95] It comprised the hearing of pleas of the Crown and the examination and correction of the errors of other courts. But Coke went further: 'this court hath not only jurisdiction to correct errors in judicial proceeding, but other misdemeanours extrajudicial tending to the breach of the peace, or oppression of the subject, . . . or any other manner of misgovernment; so that no wrong or injury, either publick or private, can be done but that this shall be reformed or punished . . .'.[96] He went on to illustrate this sweeping proposition by mentioning *habeas corpus* to secure release from unlawful imprisonment, the writ of prohibition, the granting of bail, and *mandamus* to rectify the disfranchisement of a freeman. Coke had already conceded that this jurisdiction was derived from the historic connection between the King and that court; and he might there and then have proceeded to classify *habeas corpus*, prohibition, *mandamus*, and *certiorari* to remove indictments, as prerogative writs. But for Coke to have designated them thus would have been wholly inconsistent with his views upon the relationship between the royal prerogative and the common law; for had not the King 'committed . . . his whole power of judicature to several courts of justice',[97] and was not the greatest of these the Court of King's Bench? These writs, then, were writs that issued pre-eminently out of the King's Bench; they were not the King's prerogative writs.

But if Coke chose to exalt the King's Bench rather than the King, others were not so disposed. Thus, a contemporary writer (often thought to be Ellesmere,[98] Coke's great rival) sharply criticised Coke's words in regard to misdemeanours extrajudicial: 'Herein (giving excess of authority to the King's Bench) he hath as much insinuated that this court is all-sufficient in itself to manage the State'. If the King's Bench might in truth reform 'any manner of misgovernment' there was little or no place for the exercise of the King's personal authority or that of his council.[99] This represented the outlook of the royalist lawyers. Few royalists were more ardent than Montagu, Coke's successor in office[1]; and it is in a case decided by him and three brethren not noted for their independence of the Crown[2] that *habeas corpus* is for the first time

[95] Holdsworth, *H.E.L.*, i, 204–6.
[96] Co.Inst., iv, 71. These words are taken almost verbatim from the opening sentence of his reported judgment in *Bagg's Case*, 11 Co.Rep. at 98a.
[97] Co.Inst., iv, 70.
[98] See, however, *H.E.L.*, v, 478, n. 1.
[99] *Observations on Coke's Reports*, 11. Cf. Ellesmere's speech to Coke's successor on the duties of Chief Justice for similar language: Campbell, *Lives of the Chief Justices*, i, 355.
[1] Campbell, *op. cit.*, Ch. XI.
[2] Dodderidge, Houghton and Sir John Croke.

reported as being called a prerogative writ. In Montagu's words it is 'a prerogative writ, which concerns the King's justice to be administered to his subjects; for the King ought to have an account why any of his subjects are imprisoned'.[3] His primary purpose was to emphasise that the writ would run to the Cinque Ports in spite of the fact that they were an exempt jurisdiction to which writs relating to ordinary suits between subjects would not run. Even so, it is reasonable to ascribe his use of the word 'prerogative' to his political inclinations. *Habeas corpus* was a beneficent remedy, and it was sound politics to associate its award with the King's personal solicitude for the welfare of his subjects. Its value became enhanced during the constitutional struggles of the seventeenth century—albeit, paradoxically, as a safeguard of the liberty of the King's political opponents—and it came to be regarded, with Magna Carta,[4] as the greatest bastion of individual liberty. It is therefore easy enough to explain why Mansfield and Blackstone, who were good King's men, should have insisted on the prerogative character of *habeas corpus*. And if these were the qualities which in their eyes entitled *habeas corpus* to classification as a prerogative writ, they were shared in large measure by *mandamus*, 'a command issuing in the King's name from the court of King's Bench' and 'a writ of a most extensively remedial nature'.[5] The writ of *mandamus*, moreover, expressly alleged a contempt of the Crown[6] consisting in the neglect of a public duty; and it was a writ of grace. The 'prerogative' characteristics of prohibition and *certiorari* were still more obvious. Prohibition had always been associated with the maintenance of the rights of the Crown. *Certiorari* was historically linked with the King's person as well as with the King's Bench; it was of high importance for the control of inferior tribunals, particularly with respect to the administration of criminal justice; it was a writ of course for the King but not for the subject.

In 1759 there is the first record of the four writs being collectively designated as prerogative writs. In *R.* v. *Cowle* Mansfield, answering the objection that a *certiorari* would not go to Berwick to remove an indictment because the King's writ did not run there,

[3] *Richard Bourn's Case* (1620) Cro.Jac. 543. See also the judgments of his brethren reported in Palm. 54 for like language. Similar reasoning was used in two slightly earlier cases in 2 Roll.Abr. 69; but the word 'prerogative' is not mentioned there.

[4] *Habeas corpus* was often said to be founded on Magna Carta: *H.E.L.*, i, 228. So, too, was *mandamus*: *R.* v. *Heathcote* (1712) 10 Mod. 48 at 53; Bac.Abr., *Mandamus*; *Tapping on Mandamus*, 2, 5.

[5] Blackstone, *Commentaries*, iii, 110.

[6] See the form of the writ in *Bagg's Case*, *ante*. The phrase also appeared in some modern forms of the writ: Short and Mellor, *op. cit.*, 518, 591 *et passim*.

said that the privileges of exempt jurisdictions applied only to writs summoning juries and 'perhaps to original writs which are the commencement of suits between party and party. . . . Writs not ministerially directed [7] (sometimes called prerogative writs, because they are supposed to issue on the part of the King), such as writs of *mandamus*, prohibition, *habeas corpus*, *certiorari*, upon a proper case . . . may issue to every dominion of the Crown of England'.[8]

This decision followed a line of seventeenth-century cases in which the courts had held that *habeas corpus ad subjiciendum*,[9] prohibition,[10] *mandamus*,[11] and *certiorari* [12] would issue to the courts of Chester, Lancaster, Durham, the Cinque Ports and other exempt jurisdictions. So, too, would certain other writs which, like the prerogative writs, concerned 'not the particular rights or properties of the subjects, but the government and superintendency of the King'.[13] Of these other writs, the most important was the writ of error.[14]

Why was the writ of error *not* a prerogative writ? The question may seem insignificant, but the answer that will be suggested may serve to bring out more clearly why to Mansfield and Blackstone the four writs already discussed were 'prerogative' writs. The writ of error had certain characteristics that drew it close to the prerogative group. Thus, when it issued to exempt jurisdictions it was generally returnable into the King's Bench, and the proceedings in the King's Bench were readily associated with royal superintendence over those jurisdictions. Moreover, it closely resembled some forms of *certiorari*. Again, until 1705 [15] the grant of a writ of error in criminal cases lay entirely within the discretion of the Crown, and an admission of error by the Attorney-General on behalf of the Crown was conclusive.[16] On the other hand, it

[7] *I.e.*, writs directed to the tribunal or persons immediately concerned, and not to a royal official such as the sheriff.

[8] (1759) 2 Burr. 834 at 855–6. This seems to be the first reference to *certiorari* as a prerogative writ.

[9] *Wetherley* v. *Wetherley*, 2 Roll.Abr. 69; *Richard Bourn's Case* (1620) Cro.Jac. 543; Palm. 54; *Jobson's Case* (1626) Latch. 160; but not *habeas corpus cum causa ad faciendum et recipiendum* (to bring up a defendant detained by an inferior civil court): *Anon.* 1 Sid. 431.

[10] *Warner* v. *Suckerman*, p. 49, *ante*; *Williams* v. *Lister* (1669) Hardres 475.

[11] *Richard Bourn's Case*, *ante*; —— v. *Wiggon* (*Mayor*) 1 Sid. 92.

[12] *Certiorari* would go to remove indictments: 'although the King grant *iura regalia*, yet it shall not exclude the King himself': *Anon.* (1641) March 165; but *certiorari* would not go to remove ordinary civil actions between subjects: *R.* v. *Winchelsea* (*Mayor*) (1673) Freem.K.B. 99.

[13] *Concerning Process into Wales*, Vaughan 395 at 401; cf. *Calvin's Case*, 7 Co. Rep. 1 at 20a.

[14] It went to the Counties Palatine and into Wales, but not to the Cinque Ports: Dyer 376a; Co.Inst., iv, 224.

[15] *Paty's Case* (1705) 1 Salk. 504.

[16] Stephen, *Hist.Cr.Law*, i, 309–10.

differed from the prerogative writs in important respects. In civil cases it was a writ of course,[17] and the plaintiff in error could not be denied his remedy once he proved the record to be faulty. But there was a far more decisive difference. Error was thought of as being essentially an ordinary rather than an extraordinary writ—as an everyday device whereby the private citizen could impugn the record of a lower court. And notwithstanding the Statutes of Jeofails (and perhaps because of them[18]) it was notorious that when the proceedings of the lower court were quashed it was only too often for trivial flaws on the record. Contemplation of the law of errors did not encourage flights of rhetoric. Mansfield and Blackstone were not so lacking in discrimination as to attempt to marry the royal prerogative with the unromantic writ of error.

To restate the salient features of this survey is by no means easy, for it has been a complex and tortuous tale, embodying not so much a continuous narrative as a collection of dicta and incidents. We have seen that the term 'prerogative writ' was applied to *habeas corpus* in the time of James I, in a case where the court was endeavouring to stress the superiority of *habeas corpus* over lesser writs that would not run to exempt jurisdictions. The choice of the word 'prerogative' for this purpose is explicable by the desire of royalist judges to assert the King's concern for the liberty of his subjects. Similar language was used to describe the writ of prohibition, and with greater justification, seeing that the award of prohibitions had always been connected with the rights of the Crown with respect to the administration of justice. Seventeenth-century cases also established that *certiorari* (except for ordinary civil suits between subjects) and *mandamus* would go to exempt jurisdictions; the public interest, which was commonly equated with the King's interest, demanded that they should. *Certiorari* had other good qualifications for membership of a prerogative group of writs: *e.g.*, it had originated as the King's personal command for information; it was often used to remove indictments into the King's Bench, and upon their removal the King would proceed to prosecute in his own court; it was a writ of grace for the subject. *Mandamus*, too, was a writ of grace; it alleged a contempt of the Crown consisting in the neglect of a public duty; it was at once of high governmental importance and a valuable remedy of last resort for the subject. All four writs were awarded primarily by the Court of King's Bench, a court

[17] Though the plaintiff had to assign his errors before the defendant was called into court by a *scire facias ad audiendum errores*.
[18] Plucknett, *Concise History of the Common Law* (4th ed.), 374.

which had always performed quasi-governmental functions and which was historically the court held *coram rege ipso*. In short, all four writs could well be described, by those who were so minded, as the King's prerogative writs. The King could be conceived as superintending the due course of justice and administration through the medium of his own court : as prosecuting indictments, preventing usurpations of jurisdiction and upholding the public rights and personal freedom of his subjects.

Perhaps the oddest feature of the story is that nobody seems to have thought of classifying the writs as a group until the time of Mansfield. Yet most of the writs had acquired their ' prerogative ' characteristics at least a century earlier; and the attribution of those characteristics had been due in part to an acknowledgment that they belonged to a peculiar class. But although a relationship between the writs was assumed to exist, its nature was not defined; there was no Bracton to undertake the task of systematic analysis and rationalisation. After Coke and until Mansfield and Blackstone no common lawyer except Hale was able to survey the whole field of the law with scholarship and insight. And by the time that Mansfield had perceived the close relationship between the writs [19] and had chosen to link them verbally with the rights of the Crown, each writ had developed piecemeal its own special characteristics, so that to define the class with precision in terms of characteristics common to all its members had become virtually impossible. The result, therefore, is that, although the term ' prerogative writ ' is well known wherever the language of the common law is spoken, no lawyer has ever been able to give a satisfactory answer to the question : What is a prerogative writ ?

[19] He may have obtained some of his ideas from the discussion of certain of the writs in the same context in the *Opinion on Habeas Corpus*, (1758) Wilmot 79.

A NOTE ON BROADMOOR PATIENTS

R. M. Jackson

It is not easy for students to see the subject of insanity and the criminal law as a whole. There is virtually no difficulty over what happens in court, for lawyers are concerned with that and it is adequately described in law books, notably in *Archbold*. But that is only part of the business, the other part being the concern of administrators. There is no mystery about what the officials do or about the reasons for their actions, and the application of intelligence to published material would give the student the right answer. However, a student may not get things right that way, as I remember that I failed to do (though whether by insufficiency of intelligence or of application I cannot say). I learned about these things when as a Home Office official I came to take part in working the system.[1] The purpose of this note is to give students the framework of the subject. The Criminal Justice Act, 1948, has made some changes, and it is convenient to consider first the position before that Act and to begin with a trial on indictment.

When a prisoner is put up for trial on indictment there may be some doubt as to whether he is fit to plead. The initiative may come from the court or from the defence; in the past the prosecution sometimes raised the point but under present practice the prosecution does not take the initiative. If it appears to the court that there is such a question, then a jury is impanelled to try the issue of whether the prisoner is fit to plead, which means whether from defect of his faculties he has not intelligence enough to understand the nature of the proceedings against him. Medical evidence is not necessary but it is normally given. If the jury find that the prisoner is not fit to plead, that is recorded and the court orders the prisoner to be detained until His Majesty's pleasure shall be known.[2] A similar procedure is prescribed if a person is brought before the court to be discharged for want of prosecution.[3] When that preliminary issue does not arise, or having arisen the jury finds that the prisoner is fit to plead, the trial

[1] I have to thank the Home Office for allowing me to publish this.
[2] Criminal Lunatics Act, 1800, s. 2.
[3] Criminal Lunatics Act, 1800, s. 2.

takes the normal course. If insanity is shown it must, to constitute a defence, be insanity within the M'Naghten rules and the interpreting cases; the jury may then bring in the special verdict known briefly as 'guilty but insane'[4] and the court then orders detention until His Majesty's pleasure be known.[5]

The Criminal Lunatics Act, 1884, gives a Secretary of State, in practice the Home Secretary, very extensive powers. Section 2 must be read with section 16. A prisoner, not under sentence of death, may be certified as insane by two legally qualified medical practitioners called in to assist two members of the visiting committee or by later legislation a prison commissioner or assistant commissioner. For this purpose a 'prisoner' means a person detained under any other than civil process, and it specifically includes remand, awaiting trial, safe custody and for punishment. The case of a prisoner under sentence of death is separately treated because if it appears to the Home Secretary from any source that such a prisoner may be insane it is mandatory on the Home Secretary to appoint two or more medical practitioners to examine and inquire and they may certify the prisoner as insane. In all these instances where there is certification of insanity, the prisoner may be removed on a warrant issued by the Home Secretary. I will return later to the measure of insanity and to the effect of the warrant. The 1884 Act also provides that the term 'criminal lunatic' includes what in the common jargon were known as King's pleasure lunatics and Secretary of State's lunatics. The different classes are set out below.

King's pleasure lunatics, by verdict of a jury:—

1. Found insane on arraignment.
2. Found insane when produced for discharge for want of prosecution.
3. Found guilty but insane.

Secretary of State's lunatics, certified insane when in prison:—

4. On remand.
5. Awaiting trial after committal by justices.
6. After conviction but judgment respited.
7. To serve a sentence.
8. Under sentence of death.

The second of those in the King's pleasure group hardly arises these days; it dates from the time before modern police forces and the Director of Public Prosecutions, and it can now be ignored.

[4] Trial of Lunatics Act, 1883.
[5] Criminal Lunatics Act, 1800, s. 2.

In the Secretary of State's group it is obvious that there is a great difference between 4, 5 and 6 on the one hand and 7 and 8 on the other. In the classes 4 and 5, a prisoner is destined for judicial process and he is suddenly wafted away on a warrant from the Home Secretary. In class 6 he has been convicted and is in prison temporarily so that he can be brought before the court to receive his sentence. The Home Secretary thus has power to prevent the judiciary from hearing a case or from imposing a sentence. In fact this power is used in very few cases. If a prisoner in one of these classes 4, 5 or 6 is insane and violent or raving, two considerations arise: first, he ought to be in a mental hospital and not in a prison, and second, to produce him before a court might not assist justice. If a prisoner raves and shouts continuously in the dock there is considerable physical difficulty in trying him, and the proceedings will appear a mockery and insistence upon judicial process seem gratuitous cruelty to one who is very ill. Thus when the Home Secretary does issue his warrant in these cases it is only because he is satisfied that that is required for the proper administration of justice. Table I shows the limited use that has been made of the power. As regards prisoners under respited judgment the instances are numerically few, and I should probably have omitted it, as it is omitted as a separate heading in the *Criminal Statistics*, if a case had not arisen from a judgment respited prisoner who was removed on a Secretary of State's warrant.[6]

In the case of prisoners who have been convicted and sentenced (classes 7 and 8 above) the measure of insanity is that of the ordinary medical standard used for certification under the ordinary lunacy law. For many years now it has been accepted as a principle that a man who is insane in the normal medical sense ought not to be executed and ought not to be in a prison : he should be in a mental hospital. This means that a man may, for example, be tried for murder and, after unsuccessfully putting forward a defence of insanity, be found guilty and sentenced to death, and then be certified in prison and removed as a Secretary of State's lunatic. It has been suggested that the Home Office has altered the law in not applying the M'Naghten rules, or that this is a reversal of the jury's verdict, or that it can be represented as a conflict between the lawyers and the doctors. A criminal trial and a medical examination of a prisoner are not dealing with the same issue. The trial is concerned with the question whether the prisoner is liable to

[6] *Ex parte Collins* (1889) 34 L.J.N. 132, which is a brief note of a case and insufficient to be of much value.

punishment with the further decision of what punishment should be imposed (where there is an option) or of what other order should be made. When a court sentences to death or to imprisonment it is understood perfectly well by the court that the sentence will not be carried out if the prisoner should be insane.

The statutes of 1800 (King's pleasure lunatics) and 1884 (Secretary of State's lunatics) use the word 'insane' and do not specify any test. The judges have evolved two tests :

A. On arraignment, is he now fit to plead.

B. On his trial, was he at the time of the offence insane within the M'Naghten rules.

The Home Secretary has evolved two tests:

C. When due to come before a court for trial or sentence, is he now so insane that it would be a scandal and an act of inhumanity to bring him before a court.

D. When convicted and sentenced, is he certifiably insane.

These are four different tests. We can say that A and B are the law, because they rest on decided cases, whereas C and D are the practice of the Home Office. It is worth considering whether the Home Office could apply either of the tests in A or B. To apply the test in A to C would remove from the sphere of the judiciary a number of prisoners who are now brought before courts, and to apply the test in B to C would be to remove still more prisoners from the judiciary and to substitute a Home Office judgment for the verdict of a jury. Turning now to D, the question is whether a man is to be hanged or, for a prison sentence, whether he is to be kept in prison or be removed to a mental hospital. If the test in A were to be applied to D, the result would be that men who are insane but capable of instructing counsel would be hanged or kept in prison, whilst those who were not so capable would go to a mental hospital. To apply the test in B to D would give still stranger results, for to decide what ought to be done with a prisoner now we should have to see what his state was at the time of the offence and in relation to that particular act; a man would on that idea have to be executed, or made to serve his sentence, however insane he might then be just because he was not insane within the M'Naghten rules at an earlier date. The Euclidian conclusion that because a thing is absurd it cannot be correct does not necessarily hold good for law, but the Home Office follows the best tradition of the common law in thinking that this *ratio decidendi* in Euclid is good persuasive precedent. There are four different tests because there are four different purposes to be served, and the tests and the purposes must be kept distinct as long as we keep our present law.

The 1884 Act provided that all the classes listed above may be called 'criminal lunatics'. It was an unfortunate term, because whilst in all the classes the person was insane, and so in proper English a 'lunatic', in classes 1, 2, 4 and 5 the person had not been tried and in class 3 he had been tried and in substance acquitted,[7] and untried or acquitted persons should not be called 'criminal'. The common element is that they are all insane persons for whom the Home Secretary is responsible.

We can now consider where the Home Secretary can send these people. A full history would require some account of the methods of dealing with non-criminal lunatics. Here it is enough to say that local authorities have for long been required to make provision for ordinary lunatics; the subject is largely part of the old poor law, and, whilst some public authority was liable to take in and maintain, the knotty questions were about the liability of relatives to contribute to maintenance or of which authority must maintain out of the rates. In the early nineteenth century a person found insane by verdict of a jury was sent to a local lunatic asylum. Some of these persons were violent or dangerous and the Home Secretary felt obliged to make special provision for their custody. After some years of experience of reserved parts of general institutions it became apparent that a special institution was needed. This was authorised by the Criminal Lunatic Asylums Act, 1860, and Broadmoor Asylum came into existence as a State-owned asylum run under the control of the Home Secretary and paid for out of national funds. The old local asylums came, with the development of local government, to be county and borough mental hospitals, paid for out of rates, and within the province of the Ministry of Health and its off-shoot the Board of Control. But the establishment of Broadmoor did not oblige the Home Secretary to send all criminal lunatics to it: he retained the power to choose between sending to Broadmoor or to a local authority asylum.[8] The decision as to where a particular case is to be sent depends on many factors, but a particularly important consideration is that Broadmoor is better able to handle violent and dangerous cases than an ordinary local mental hospital. Table I, consolidated from annual Tables in the *Criminal Statistics*, shows the number of cases for five pre-war years and the institutions to which persons were sent. The *Criminal Statistics* have been shortened since 1938 and later figures have not been published.

[7] A special verdict of guilty but insane is treated as an acquittal barring an appeal: *Felstead* [1914] A.C. 354.

[8] An asylum appointed under the 1860 Act is a Criminal Lunatic Asylum. The uninformed assume that all criminal lunatics are sent to a criminal lunatic asylum, which is an error repeated by some lawyers.

Table I

Reception of Criminal Lunatics into Institutions:

A. Into Broadmoor;

B. Into county and borough mental hospitals.

	1934		1935		1936		1937		1938	
	A	B	A	B	A	B	A	B	A	B
King's Pleasure Lunatics—										
Insane on arraignment .	16	6	17	4	19	3	22	3	24	3
Special verdict of guilty but insane . . .	26	—	23	1	20	5	17	2	20	—
Secretary of State's Lunatics—										
Certified insane before trial	—	1	—	—	—	—	—	1	—	—
Certified insane after conviction	6	90	8	74	7	56	17	102	11	80

Whether a person is sent to Broadmoor or to a local mental hospital, discharge requires a warrant from the Home Secretary. Discharge may be absolute or conditional, the latter being in effect release on licence with the possibility of breach of the conditions or revocation of the licence resulting in a return to a mental hospital.[9] There are however differences in the position of the various classes. Those in classes 1, 2, 4 and 5 have not been tried, and those in class 6 have not been sentenced: here, if they recover, they may either be discharged or be remitted to prison for the legal proceedings to be resumed at the point where they had been interrupted.[10] In class 7, where there is a sentence of definite length, the Home Secretary has control only up to the date when the sentence expires. If the person recovers before that date he can be discharged or remitted to prison to serve the rest of his time. If he remains in Broadmoor or in a local mental hospital until the period of the sentence runs out, he ceases to be a concern of the Home Secretary; the medical superintendent must discharge him or take steps to have him dealt with as an ordinary mental patient according to his condition.[11] A prisoner who was under sentence of death (class 8 above) when he was certified is in the same position as if he had been sentenced to life imprisonment and then

[9] Criminal Lunatics Act, 1884, s. 5.

[10] Criminal Lunatics Act, 1884, s. 3.

[11] In the past he was either looked after by private arrangements or became a 'pauper lunatic,' later called 'rate-aided,' and now he joins the rest of us in getting treatment under the National Health Service.

certified, that is, there is no period of sentence to expire, and on recovery he may either be discharged or remitted to prison. Those in class 3, who have been tried and found guilty but insane, may on recovery be discharged, but in no circumstances can they be remitted to prison.[12]

Thus, when a patient becomes sane the Home Office may have to consider either discharge or remitting to prison, and that discretion is exercised by considering each case individually. Reference to Table I will show that the total number of cases is not large. Of those the biggest group is that of persons who are certified whilst serving sentences, and the majority of these do not recover by the time the sentence runs out, and so the Home Office does not have to consider discharge or remitting to prison. A substantial proportion of other patients do not recover, and the cases calling for serious consideration are few enough to be dealt with individually and without any administrative rules. Table II shows the position in cases other than those where a sentence expires.

TABLE II

Discharge of criminal lunatics otherwise than upon expiration of sentence:

A. From Broadmoor;

B. From county and borough mental hospitals.

	1934		1935		1936		1937		1938	
	A	B	A	B	A	B	A	B	A	B
Absolutely discharged	6	—	5	—	4	2	3	1	6	3
Conditionally discharged	31	1	44	4	30	1	25	3	10	5
Died	23	4	15	5	26	4	23	5	22	4
Remitted to prison	2		1		2		—		2	

Three points stand out. First, very few persons are remitted to prison. The reasons are various, but it may be observed that there are often difficulties in the way of a trial after a lapse of time, and the insanity for which he was detained may well indicate that had the trial proceeded there would have been a verdict of guilty but insane. Second, conditional discharge is more common than absolute

[12] If on a capital charge a jury finds a man guilty but insane and he is sent to Broadmoor and there, in the view of the medical men, is regarded as not being insane at all, the practice is to keep him in Broadmoor for a period corresponding to that for which he would have been kept in prison if he had a commuted death sentence: see Part I of the Minutes of Evidence of the Royal Commission on Capital Punishment.

discharge, for the obvious reason that the power to impose conditions makes it feasible to see how a person gets on outside an institution. Incidentally, an absolute discharge simply means that the Home Secretary finishes with the case and it does not exclude the possibility of the patient going into some other institution. Third, what is the length of time for which patients are held? The figures do not show this, but they do dispose of one myth, that criminal lunatics are normally kept for life; if the annual rate of discharges exceeds the annual death rate, then more than half the inmates must get discharged.[13] There is a statutory obligation upon medical superintendents to report at least once a year on each case to the Home Secretary, and the Home Secretary is required to consider each case at least once in every three years.[14] In fact cases are considered more frequently than the statute requires. Whilst discharge must depend very much on the medical views of the patient's recovery, there are necessarily differences between the discharge of ordinary mental patients and of those called criminal lunatics. The Home Secretary is responsible for public safety, and he must be somewhat cautious when those in his charge are potentially dangerous, and on occasion discharge must be delayed until the medical prognosis is more definite.

In recent years the terms 'lunatic' and 'asylum' have been generally replaced by 'patient' and 'mental hospital'. The Criminal Justice Act, 1948, follows this practice, and 'criminal lunatic' becomes 'Broadmoor patient', and a 'criminal lunatic asylum' becomes a 'Broadmoor institution'. Another change is that any state-run asylum under the 1860 Act ceases to be run by the Home Office and vests in the Minister of Health and is run by the Board of Control. The county and borough mental hospitals were transferred to Regional Hospital Boards under the Minister of Health through the National Health Service Act, 1946. These changes do not however affect the position as explained earlier in this note. The Home Secretary keeps his powers of removal from prison by warrant, of sending to Broadmoor or to some other mental hospital, and of discharge from any institution. The new terminology may be more refined than the old, but it is equally misleading, for Broadmoor patients are not necessarily in Broadmoor.

The Criminal Justice Act, 1948, gives additional powers to magistrates' courts to obtain medical reports on persons charged

[13] There is a footnote in Kenny, *Outlines of Criminal Law*, repeated in successive editions (p. 67 in the 15th ed., 1936) that apart from puerperal mania only about one prisoner in 150 obtains release from Broadmoor, but no date is given for that figure nor is there any indication of its origin. This footnote is probably the authority upon which many statements about Broadmoor are based.

[14] Criminal Lunatics Act, 1884, s. 4.

with offences. It has always been possible to get a medical report by remanding the person to prison or committing to prison to await trial and asking the prison authorities to have the prisoner examined. Facilities are given on request for the prisoner to be examined by his own doctor. Under the 1948 Act, if an offence triable summarily is punishable by imprisonment, a magistrates' court may, on finding that the charge is proved, either remand in custody for a medical report, or remand on bail with conditions about submitting to medical examination. A similar power is given when justices commit a person for trial. The conditions may be of attendance at a clinic, or of residence for a specified period as a voluntary patient in an institution, or of submission to examination by a specified medical practitioner. The new powers should enable courts to have medical reports whenever they would be useful.

Two new powers of dealing with offenders who are mentally abnormal are given by the 1948 Act. The first is the power of all courts on making a probation order to include in the order requirements for the submission by the probationer to treatment (including residence in an institution) for his mental condition. This is a very important power, but it may not be used if the person's condition would justify certification under the Lunacy or Mental Deficiency Acts. The second new power applies only to magistrates' courts, and it gives them power in some circumstances to send an insane defendant to a mental hospital.[15] Before the 1948 Act the practice was either to commit for trial where that could be done and was appropriate, or to discharge the person and see that steps were taken to have him certified. The National Health Service Act altered the law about persons detained on reception orders by providing that such a person may be discharged on a direction in writing by the appropriate relative unless the medical officer of the institution certifies that the patient is dangerous and unfit to be at large. Hence justices should not make a reception order unless it is the type of case that would receive such a certificate from a medical officer. An order has the same effect as a summary reception order made

[15] Section 24. (1) Where a person is charged before a court of summary jurisdiction with any act or omission as an offence punishable on summary conviction with imprisonment, and the court—

(a) is satisfied that the person did the act or made the omission charged; and

(b) is satisfied on the evidence of at least two duly qualified medical practitioners that the person is of unsound mind; and

(c) is also satisfied that he is a proper person to be detained,

the court may, in lieu of dealing with him in any other manner, by order direct him to be received and detained in such institution for persons of unsound mind as may be named in the order . . . .

under the Lunacy Acts, the patient becoming an ordinary patient and not a Broadmoor patient.

If a magistrates' court makes a reception order, is the defendant convicted or acquitted? The Act does not say. The drafting of the Criminal Justice Act in other sections uses the word 'convicted' when there must be a conviction before a power may be exercised, whereas section 24 does not specify a conviction and indeed appears to avoid that term. On the wording it certainly looks as if the defendant is not convicted when a reception order is made. But is he then acquitted? The insanity for section 24 is apparently ordinary certifiable insanity, and if a reception order means an acquittal it must follow that certifiable insanity is a defence in a magistrates' court whereas at a trial on indictment insanity can be a defence only if it is within the M'Naghten rules. There is a presumption that a statute does not alter important legal rules by a sidewind and it would be surprising if the judges were to hold that section 24 alters the principles of criminal responsibility. The answer may be that there is neither conviction nor acquittal: a power arises in the course of the proceedings, and the court exercises that power. There are comparable provisions under the Mental Deficiency Acts, the effect being that certifiable mental deficiency does not constitute a defence but gives the court power to proceed under the Act. A conviction is required at a trial on indictment, but a magistrates' court may act if they find the charge proved, without proceeding to a conviction.[16]

I have raised this question on section 24 because it is the kind of point that a lawyer, student or not, may well take. The word 'insanity' is associated with 'defence'. Endless discussions go on about when insanity should and should not be a defence. Meanwhile the law has been growing in another direction largely ignoring 'defence' and 'guilty' and 'not guilty'. The newer law recognises two principles. The first is that it must be proved that the defendant did the act or made the omission charged; this decides whether a court may deal with him at all. The second principle is that if the court is to deal with him, the court must have a wide choice of remedies or treatment available. It is the law of murder, with the inevitable sentence of death on conviction, that keeps alive the question of insanity as a defence.

[16] Mental Deficiency Act, 1913, s. 8.

FREDERIC WILLIAM MAITLAND

A Memoir by the late Mrs. Reynell [1]

It has been suggested that a notice of Professor Maitland from one who may claim to have known him all his life would be acceptable, and it is especially suitable that an accurate account should be given of one who was so careful in his own statements.

Many years ago a friend was wont to say that much might be expected from one who had two such grandfathers and such a father, so something should be said of each of them; or perhaps one might begin sooner, for this reason—landed property at Brookthorpe and Harescombe came into the possession of Alexander Maitland by his marriage with Caroline Busby in 1785, and the late professor was, up to the time of his death, known in Gloucestershire as 'Squire Maitland'. Their only son was Samuel Roffey Maitland, who was librarian at Lambeth in the days of Archbishop Howley. It has been often mentioned that there was much similarity in the tastes of the grandfather and grandson. A letter from Professor Maitland written in 1891 may show the influences of the one on the other and is sufficiently characteristic to be interesting. His sister had asked him whether their grandfather's books would live. He wrote :—

'I can well imagine that the grandfather does not receive unbounded admiration from you. But judging him merely as I should judge any other literary man, I think him great. It seems to me that he did what was wanted just at the moment when it was wanted, and so has a distinct place in the history of history in England. The *Facts and Documents* (*illustrative of the History, Documents and Rites of the Ancient Albigenses and Waldenses*) is the book that I admire most. Of course it is a book for a few, but then those few will be just the next generation of historians. It is a book which " renders impossible " a whole class of existing

[1] Mrs. Reynell was Maitland's eldest sister. The article on him in the *Dictionary of National Biography* by B. Fossett Lock refers to an unpublished memoir by her. When I was writing a lecture in commemoration of the centenary of Maitland's birth, I obtained, through the kindness of Miss Maitland, a copy of the memoir, which, I then found, existed only in mimeograph. As it seemed to me that it would be annoying for any future student interested in Maitland to know of the existence of such a document but not to have access to it, I asked Miss Maitland to obtain from Mrs. Reynell's family permission for the memoir to be published in the *Cambridge Law Journal*. This permission, gladly given, is warmly appreciated.—H.A.H.

books. I don't mean physically impossible, men will go on writing books of that class—but henceforth they will not be mistaken for great historians. *One has still to do for legal history something like the work that S.R.M. did for Ecclesiastical history*—to teach them, *e.g.*, that some statement about the thirteenth century does not become the truer because it has been constantly repeated,—that " a chain of testimony " is never stronger than its first link. It is the " method " that I admire in S.R.M. more even than the style or the matter—the application to remote events of those canons of evidence which we should all use about affairs of the present day—*e.g.*, of the rule which excludes " hearsay ". You see how easily I run off into a lecture.

I am just sending off a paper on Becket to the *English Historical*. It may interest you more than anything else that I have written '.

Of John Gorham Maitland, the present writer would prefer allowing another to speak. He was one ' the extent of whose powers and attainments his great modesty veiled from the world. At Cambridge he seemed never to have any work to do, yet he was third Classic of his year, second Chancellor's Medallist and seventh Wrangler. His mind embraced all subjects and was as fitted for the work of life as for speculation ' (*Macmillan's Magazine*, November, 1864). Like his son, he held high office at the Union while in Cambridge, and not obtaining success at the bar, had to fill up his leisure time until he found another sphere—he became Secretary to the Civil Service Commissioners. He did not turn to the British Museum for occupation—there are political pamphlets which were at the time successful—he wrote for a while for the *Morning Chronicle*, and there are translations of German poems which at one time he thought of publishing. He married in 1847, Emma, second daughter of John Frederic Daniell, one of the first Professors at King's College, London, the friend and colleague of Wheatstone and Faraday, whose discoveries in Natural Science gained for him the three medals of the Royal Society and various other distinctions.

Frederic William Maitland was born in Guildford Street on May 28, 1850. His parents left the house shortly afterwards, so that the first home he could remember was 39 Woburn Place. His mother died after a very short illness on December 26, 1851. At that time her elder sister, Charlotte Louisa, came to live with her brother-in-law and take care of his three children. It was her death in 1880 that parted her from them. Mr. Maitland's love of German led him to wish that his children should learn it well, and they were early taught to speak it. Professor Maitland owed much, it is said, to German writers, and in a letter written to one

of his sisters, probably when he was translating Dr. Giercke's work, there was this phrase — 'blessed be all your German governesses'. He dropped his German at school having only a few lessons at Eton, but resumed it at Cambridge, when he was planning a tour in Germany.

Frederic had been to begin with somewhat delicate, but he gradually outgrew this. He was always fond of music, but for many years he was more remarkable for eager interest in everything and for general activity of mind than for any more special gift. Life was uneventful at this time, chiefly varied by visits to grandparents at Gloucester. Frederic's first school was at Brighton, in the house of Mr. Edward Peters, who afterwards took credit for having refrained from 'making a show boy' of him: but he did refrain and contented himself with sending up a pupil who could take an average place at Eton.

His father died on April 27, 1863. He had wished that his son should go to a large public school, having regretted that his own education had been with a private tutor. This wish was carried out, and Frederic went to Eton in the autumn of 1863.

Dr. Maitland was still alive, but his health was already failing, and it therefore fell to the lot of Miss Daniell to take the entire care of her nephew and nieces. Shortly after Frederic's arrival at Eton his tutor the Rev. W. A. Carter accepted an Eton Fellowship, and he therefore migrated to the house of the Rev. E. D. Stone. In this selection and in many other educational matters his aunt acted on the advice of the Rev. J. W. Blakesley (afterwards Dean of Lincoln).

At Eton there was perhaps little to distinguish F. Maitland's life from that of other boys. He played football, was for a while a volunteer, rowed so much that he 'spoilt his style', spent Sunday afternoons in running to St. George's Chapel to hear the anthem, and more than once began the holidays by walking home to Kensington. He worked sufficiently, but he has himself told us that Greek was not a congenial subject, and he gained no special prizes or distinctions until just before leaving, when he was bracketed with two others for the Newcastle-under-Lyme prize and owed his success to a paper on Chaucer. One of the few letters from him that have been kept is amusing :—

'Tomorrow morning I shall arise a reformed Etonian. "My, aint it terrible, what shall we du?" We are going to learn all manner of abominations, have all manner of extra schools, and be turned wholesale into radicals. Today, the 10th of May, 1868, the Fourth Sunday after Easter, the festival of the Blessed Antoninus, Bishop and Confessor, is our last day of unreformed

bliss. The old Masters are furious (bless their dear old conservative souls!) the young ones jubilant (like a lot of nasty radicals that they are). I have got my choice of five subjects—French, German, Italian, Logic or Political Economy. The choice lies between German and Mr. Wm. Johnson on Political Economy. Bathing is allowed and I got up early this morning and had my first bathe while tutor was in bed: we being allowed to bathe very early on Sundays. I was tried for an oar in the Dreadnought, but of course, I did not get in, which was no disappointment. I have still just the bare chance of being in the Thetis. Tell Aunt Louisa that I am getting stronger though my voice goes in the evening and has made tutor exclaim several times: it is better though and will, I hope, return very soon. Oh! tutor's Exam: hangs over me like a great bugbear. By the way why cannot —— be a radical though he wishes to reform us? Give it up? Because he is only a Curly W(h)ig. Eugh! After that I had better go to Chapel, don't you think, so good-bye'.

Maitland left Eton in the summer of 1869, and after a short tour in Switzerland in the course of which he astonished an elder travelling companion by feats of walking, he entered at Trinity College, Cambridge, on the side of the Rev. Robert Burn. For the first year he read Mathematics, but in other respects carried on much the same life as at Eton, winning a prize in the Freshman's Mile Race, and achieving the honour of being sent as a freshman with Mr. Edward Hawtrey to run the three mile race at the Oxford and Cambridge sports.

It is not ill-natured to tell a story he so often told himself and commended to the consideration of those who had the guidance of young men. His words were—'I should never have succeeded if I had not failed once'. Will anyone ever care to look out his place in the Trinity May Examinations? An invitation to go to Eton with friends was promptly refused with the saying:—'I could not meet my tutor after *that*'. New times were coming. He became aware that Mathematics was not his line, also it can scarcely have been at any other time than this that 'the idle whim of an idle undergraduate' took him into Mr. Sidgwick's Lecture Room. He has himself told us of this, and the speech can be read in Mr. Sidgwick's Life. (May it be noticed that 'idle' is his own word—no one else's—his mind was always at work but he had not yet concentrated it on any particular branch of study—this does not suit Examiners.) Whatever the causes were the facts are evident. F. Maitland changed the subject of his reading from Mathematics to Moral Science, resolutely sent away the piano which he thought had led to 'idleness', and gave up Athletic Sports although

he kept up some rowing which he thought less likely to prove distracting. His first lodgings were alone in Malcolm Street, afterwards he had rooms in Sidney Street with Mr. Clinton Dent, still later Mr. (now Dr.) Cunningham joined him, and the two, friends rather than rivals, read for a Moral Science Scholarship at Trinity. To the joy of at least one of them the Authorities made room for both, and they both obtained Scholarships. This brought Maitland many new friends, and he often afterwards alluded to the change that joining the more brilliant set of undergraduates at the Scholars' Table in Hall made to him. He became well known at the Union, in course of time president, joined a number of various associations of an intellectual sort, was bracketed with Dr. Cunningham, first in the Moral Science Tripos, and took his Degree on January 25, 1873. During the following Long Vacation he stayed up in Cambridge to read for the Whewell Scholarship which he obtained in the Michaelmas Term.

As an undergraduate he had begun keeping terms at Lincoln's Inn, but about this time the chance of obtaining a Moral Science Fellowship turned his mind in another direction. He wrote of himself as 'too poor and too ambitious' to care to meet a failure at the bar, and added that he knew the 'price of success', the giving up reading and study which had 'become very dear' to him. (Perhaps it should be said that in this case the receiver quotes from memory not from an existing letter.) It is well known that Professor James Ward obtained the Fellowship; also it is, or was, well known in Cambridge that the decision which the Examiners had to make was not an easy one. It only remains to be said that the spare copies of the rejected candidate's essay on Political Philosophy were sent to Mr. Sidgwick for circulation among his pupils, showing appreciation from one of whom near the end of his life Professor Maitland still spoke—as 'his Master'.

From this time until 1885, he lived in London with his family, reading first with Mr. Upton a Conveyancer and afterwards with Mr. B. B. Rogers.

His college friend Dr. Verrall was at this time his fellow pupil and for a while shared Chambers with him. His keen interest in practical law has been commented on by others and shews itself in his literary work. There were many other interests and pursuits: he delighted in the Opera, perhaps chiefly in Wagner's works, in Concerts at the Crystal Palace and St. James' Hall, and whenever he could leave his work in London, in adventurous walking on Dartmoor, in Wales, and Scotland. There were at least two foreign tours in 1873 and 1881. On the first occasion he started with friends and remained alone after their return, joining his family at

Bonn for the Schumann Commemoration and going with them to Switzerland. He long afterwards said he had gained much from being alone at Munich and entering for a while into German life. The direction of the other tour was through Switzerland over the Simplon to Bavens, but there were many excursions. As to the ever-increasing development of his non-professional work, we have his own words spoken in his Inaugural Lecture. 'I had not the advantage of studying Law at Cambridge otherwise perhaps I should not have been a barrister of seven years' standing before I had any idea of the whereabouts of the first hand evidence for the law of the Middle Ages'. In other words there were at least seven years to be filled up before he found the work that suited him best. (The date of the *Pleas of the Crown for the County of Gloucestershire*, his first considerable work on legal history, is 1884.) During this time he lectured on political economy at Rochdale and elsewhere, began but did not at that time publish a translation from Savigny and wrote various magazine articles: among these he devoted much time and thought to a series on Herbert Spencer in *Mind*, and there is an article in the first number of the *English Illustrated Magazine* on the old and new Law Courts which has interested general readers; *Justice and Police*, a small work in the English Citizen series, was written at this time. F. Maitland also took interest in the University Extension Scheme, trying to establish lectures near his home in Kensington and lecturing at another centre on Political Philosophy. Somewhat later he gave fortnightly lectures at Liverpool University. He has recorded his first introduction to Sir Leslie Stephen in 1880 and written of the Sunday Tramps and Scratch Eight: perhaps he does not say enough of his contributions to the *Dictionary of National Biography*. In 1883 he again went abroad with his sister joining Mr. and Mrs. A. J. Butler in the Tyrol; this journey has lately been described in the Athenæum. In the midst of varied occupation there was however some feeling of disappointment. 'Only a few of the men who choose that profession (the Law) can succeed in it: the qualities which make a man a great lawyer are rare and space on the woolsack is strictly limited. The Cambridge Law Student should be prepared for either fortune. The day may come when in bitterness of his soul he will confess that he is not going to succeed, when he is weary of waiting for that Solicitor who never comes, when the prolonged and costly education seems thrown away.' These are his own words—he was to succeed in another line. A casual observation can be remembered—'Professor Sidgwick will not leave him alone till he gets him at Cambridge'. Is it not a proof of the Knightbridge Professor's discernment that he should have seen that he would

thus be bringing a man into his right place? There had been other suggestions as to Cambridge work; at length the Readership of English Law was established at the end of 1884 and Maitland returned to Cambridge, first to lodgings, afterwards to rooms in Trinity—he had found his vocation in life and he knew that he had done so.

In 1886 he married, at Brockenhurst, Hampshire, Florence Henrietta, daughter of Mr. H. L. Fisher, Vice-Warden of the Stannaries and niece of his friend Mr. Leslie Stephen. For a short time they lived at Brookside, but on the death of Professor Birkbeck in 1888, the Reader succeeded him as Downing Professor of the Laws of England and went to Downing.

In 1887 he had completed a larger work than he had hitherto published—an edition of *Bracton's Note Book*. His first work for the Selden Society in which he was so much interested for the remainder of his life appeared in 1888.

This notice may well end here. There are others who can tell more of his strenuous University life, of his rising fame and honours, of his brave struggle against ill health, of his gentle and beautiful life at home; it has rested with one who loved him all along to show how he gradually settled down to work and gradually discovered the work that it was best for him to do.

A RAMBLE WITH *RES IPSA LOQUITUR*

T. Ellis Lewis

In this preliminary article it is not intended to deal with the maxim *res ipsa loquitur* in its manifold ramifications but to consider its origin and development, the requirements for its application, some reasons for its complexities, and its broad effect in English law.

Res ipsa loquitur is a convenient label or symbol which means no more than it says, that sometimes the thing speaks for itself, in the sense that in some circumstances the mere fact of an accident happening raises an inference of negligence so as to establish a prima facie case. Lord Shaw's views as to its use and application are: '(1) It is the expression in the form of a maxim of what in the affairs of life frequently strikes the mind, *i.e.*, that a thing tells its own story—not always, but sometimes. (2) But, although a thing tells its own story, that is not necessarily the whole story. Accordingly (3) when the story would seem relevant . . . to infer liability for some occurrence out of the usual, the remainder of the story may displace that inference. But (4) if the remainder of the story does not do so, then the inference remains: *res ipsa loquitur*. The expression need not be magnified into a legal rule; it simply has its place in that scheme of, and search for, causation upon which the mind sets itself working'.[1] The story should be clear and unambiguous; if it may tell any one of half a dozen stories the maxim is inapplicable.[2] The maxim may be dealt with in two sections: A. Its origin and the requirements for its application. B. The burden of proof it imposes on the defendant.

A. The *fons et origo* of *res ipsa loquitur* in English law is the case of *Byrne* v. *Boadle*[3] in 1863. The plaintiff while walking in a street was injured by the fall of a barrel of flour from an upper window of premises occupied by the defendant. The plaintiff gave no evidence as to how the barrel fell, or to show that the defendant or his servants were in charge of or dealing with it. At the close of the plaintiff's case it was objected that there was no evidence for the jury either to connect the defendant with the occurrence

[1] *Ballard* v. *North British Ry.*, 1923 S.C.(H.L.) 43, at p. 56.
[2] *Carruthers* v. *MacGregor*, 1927 S.C. 816, *per* Lord Murray at p. 823.
[3] (1863) 2 H. & C. 722; 33 L.J.Ex. 13. Pollock C.B., Bramwell, Channell and Pigott BB.

or to prove negligence. The defendant called no evidence. The Court of Exchequer, nevertheless, unanimously ruled to enter a verdict for the plaintiff. In the course of the argument Pollock C.B. said: 'There are certain cases of which it may be said *res ipsa loquitur*, and this seems to me to be one of them. In some cases the Courts have held that the mere fact of the accident is evidence of negligence, as for instance, in the case of railway collisions',[4] and later in his judgment: 'I think that is a case . . . clear beyond doubt, that there would be prima facie evidence of negligence. It cannot be in the ordinary course of business, without some negligence'. In *Skinner* v. *L. B. & S. C. Ry.* (1850) two trains belonging to the same company collided and injured the plaintiff, a passenger. At the trial, Pollock C.B. told the jury that the accident itself was prima facie evidence of the defendants' negligence, and the jury found for the plaintiff. In the Court of Exchequer, counsel argued that the effect of the judge's direction was to cast the *onus probandi* on the wrong party, for where a plaintiff complains of negligence he must prove it, and for that purpose it was not enough to show that an accident happened; the plaintiff must go further and prove it was the result of the defendants' negligence. The court held otherwise, Alderson B. pointing out that this was not a collision between two vehicles belonging to different persons, where no negligence could be inferred against either party in the absence of evidence as to which of them was to blame. As the trains belonged to the same company, whatever the probable cause of the accident, there was no need for the plaintiff to trace specifically in what the negligence consisted; and if it arose from some inevitable fatality it was for the defendant to show it.[5] In *Scott* v. *The London and St. Katherine Docks Co.* (1865),[6] the plaintiff, a customs officer, whilst lawfully passing the doorway of the defendants' warehouse in the docks was injured by six bags of sugar falling on him. The defendants called no evidence, and at the close of the plaintiff's examination in chief, Martin B. directed the jury to find a verdict for the defendants as there was not sufficient evidence of negligence on the part of the defendants. The Court of Exchequer Chamber affirmed the ruling of the Court of

[4] At p. 725.

[5] 5 Ex. 788, at p. 789. *Carpue* v. *L. & B. Ry.* (1844) 5 Q.B. 747 (train running off the line). The case is explained in *Hanson* v. *L. & Y. Ry.* (1872) 20 W.R. 297, *per* Brett J. at p. 298.

[6] (1865) 3 H. & C. 596. No one but the plaintiff was at the place, he had no warning, there was no fence or barrier, no one called out; he heard the rattling of a chain. Martin B., at the trial, stated that even assuming the bags of sugar were being dealt with by the servants of the defendants in the course of their employment, there was not sufficient evidence of negligence on their part to allow the case to go to the jury, at p. 597.

Exchequer[7] directing a new trial. The first statement of the so-called principle was made by Erle C.J. in this case. Although he and Mellor J. could not agree with the majority as to the 'reasonable evidence of negligence which has been apparent to the rest of the court'; they unanimously assented to the following principles. 'There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, *it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care*'.[8] The phrase *res ipsa loquitur* is not used in any of the judgments.

In *Kearney* v. *London and Brighton and South Coast Ry.* (1870) a brick forming part of a railway bridge fell upon the plaintiff who was passing along the highway; the defendants called no witnesses and rested their defence on there being no evidence of negligence. Cockburn C.J. said: 'My own opinion is, that this is a case in which the principle of *res ipsa loquitur* is applicable, though it is certainly as weak a case as can well be conceived in which that maxim could be taken to apply'.[9] He then gives a lucid exposition of the way in which the rule is to be applied. 'But inasmuch as our experience of these things is, that bricks do not fall out when brickwork is kept in a proper state of repair, I think that where an accident of this sort happens, the presumption is that it is not the frost of a single night, or many nights, that would cause such a change in the state of the brickwork as that a brick would fall out in this way; and it must be presumed that there was not that inspection and that care on the part of the defendants which it was their duty to apply. . . . A very little evidence would have sufficed to rebut the presumption which arises from the manifestly defective state of the brickwork. It might have been shown that many causes over which the defendants have no control, might cause this defect in so short a time that it could not reasonably be expected that they should have inspected it in the interval. . . . Therefore, there was some evidence to go to the jury, however slight it may have been, of this accident having

[7] In the Court of Exchequer, Channell and Pigott BB. (Martin B. *dissentiente*, Pollock C.B. *dubitante*), ruled there was evidence of negligence (1864) 13 W.R. 99. In the Court of Exchequer Chamber, Crompton, Byles, Blackburn and Keating JJ., *dissentientibus* Erle C.J. and Mellor J.

[8] *Per* Erle C.J. at p. 601. (Italics supplied.)

[9] (1870) L.R. 5 Q.B. 411, at p. 413. Affirmed in the Exchequer Chamber (1871) L.R. 6 Q.B. 759.

arisen from the negligence of the defendants; and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts'.[10]

Thus, in origin, the maxim contains nothing new, it is based on common sense.[11] If an accident of an unusual kind happens, the circumstantial evidence,[12] that is, the circumstances attendant on the accident, may be themselves of such a character as to enable or justify the judge or jury to arrive at the apparently obvious conclusion that it was the result of the defendant's fault.

The maxim has been much criticised. Lord Dunedin said: 'Truly there is no such thing as . . . the principle of res ipsa loquitur'[13]; Lord Shaw: 'If that phrase had not been in Latin, nobody would have called it a principle. . . . The expression need not be magnified into a legal rule. . . . The day for canonising Latin phrases has gone past'.[14] It has been referred to as 'meaningless jargon. In every case where the phrase *res ipsa loquitur* has been glibly applied living witnesses have proved circumstances in which the defendant's liability is a reasonable inference. The plaintiff is as well off without the maxim, and it appears to create a distinction of principle between types of cases where none exists'.[15] The words are hardly a proposition of law, though they refer to one. They are a figure of speech.[16]

It is not possible to catalogue *res ipsa loquitur* cases; every accident differs from every other, every one has its own circumstances and facts are infinitely various. No useful purposes would be served, for 'the proof of facts by facts is incapable of reduction to a formula; it has an inconvenient habit of depending always

[10] (1870) L.R. 5 Q.B. at pp. 415–6. *Briggs* v. *Oliver* (1866) 35 L.J.Ex. 163, 'I think there was [evidence] and that this is one of those cases in which . . . *res ipsa loquitur*. Packing cases carefully placed in a proper position do not naturally tumble down of their own accord; . . . and as in *Scott* v. *London Dock Company* . . . the facts show a prima facie case', *per* Bramwell B. at p. 164.

[11] *Barkway* v. *South Wales Transport Co., Ltd.* [1950] 1 All E.R. 392, *per* Lord Normand at p. 399.

[12] *Craig* v. *Glasgow Corporation*, 1919 S.C.(H.L.) 1, *per* Lord Finlay at p. 10. 'Circumstantial evidence may be just as valuable as direct evidence. It may vary very much in degree . . . . The facts in the present case speak, in a whisper it is true, but still audibly'. *Grant* v. *Australian Knitting Mills* [1936] A.C. 85, *per* Lord Wright at pp. 96–7.

[13] *Ballard* v. *North British Ry.*, 1923 S.C.(H.L.) 43, at p. 53.

[14] *Ibid.* at p. 56. The American view is still stronger. It is 'a source of so much confusion in the courts that the use of the phrase has become a definite obstacle to any clear thought, and might better be discarded entirely'. Dean Prosser, *Handbook of the Law of Torts* (1941), p. 293, and quoting Bond C.J. in *Potomac Edison Co.* v. *Johnson* (1930). 'It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion into our legal discussions. It does not represent a doctrine, it is not a legal maxim, and is not a rule of law.' 62 S.A.L.J. (1945), 408–13. L. M. N. Hodson.

[15] Gahan, 1937 *The Bell Yard*, No. XX, at p. 28.

[16] *Easson* v. *L. N. E. Ry.* [1944] K.B. 421, *per* du Parcq L.J. at p. 425.

on the facts '.[17] However, from the classical exposition of Erle C.J., the three requisites for its application are: (1) the thing which causes the harm must be under the control of the defendant; (2) while under his control an accident happens which would not in the ordinary course of things happen without negligence, (3) the defendant gives no explanation.

(1) The thing, or the instrumentalities or the injurious agency and the surrounding circumstances which causes the harm must be under the exclusive[18] control or management of the defendant or his servant. It applies 'when the operation of the thing which caused the accident is *at the material time* wholly under the control of the defendant '.[19]

Control is a term of varying and relative import and includes the right to control. Ownership alone—without possession—may be enough, as in *Parker* v. *Miller*, where the defendant lent his car to a friend who parked it outside his house; the car ran down a hill and damaged the plaintiff's premises, the defendant who called no evidence was held liable.[20] The maxim may apply to colliding vehicles,[21] but it is easier to apply when vehicles mount pavements and injure pedestrians or property.[22] A surgeon assisted by an anæsthetist, theatre sister and two nurses has sufficient control to be liable for a failure to remove a swab from a patient after an abdominal operation.[23]

The question of control is brought into focus by comparing *Easson* v. *L. & N.E. Ry.*[24] with *Gee* v. *The Metropolitan Ry.*[25]

[17] Dean Prosser, 37 *California Law Review* (1949), at pp. 187–8.

[18] *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1926) 95 L.J.K.B. 237. 'Entirely under the control . . .', *per* Scrutton L.J. at p. 241. 'Under the sole control . . .'.

[19] *Easson* v. *L. N. E. Ry.* [1944] K.B. 421, *per* Lord Goddard L.J. at p. 422. *Mahon* v. *Osborne* [1939] 2 K.B., *per* Scott L.J. at p. 21. *Wing* v. *L. G. O. Co.* [1909] 2 K.B. 652. 'When the direct cause of the accident and so much of the surrounding circumstances as were essential to its occurrence were within the sole control or management of the defendants . . .', *per* Fletcher Moulton L.J. at p. 663.

[20] (1926) 42 T.L.R. 408. But see du Parcq L.J. in *Hewitt* v. *Bonvin* [1940] 1 K.B. 188, 195–6. *Barnard* v. *Sully* (1931) 47 T.L.R. 557. *Gayler and Pope* v. *Davies* [1924] 2 K.B. 75 (unattended horse bolting in street).

[21] Cf. Fletcher Moulton L.J. in *Wing* v. *L. G. O. Co.* [1909] 2 K.B. 652, at pp. 663–4. 'Every vehicle has to adapt its own behaviour to the behaviour of other persons using the road, and over their actions, those in charge of the vehicle have no control.' It surely might apply to a vehicle running into another from behind.

[22] *Ellor and Wife* v. *Selfridge & Co., Ltd.* (1930) 46 T.L.R. 236 (some evidence of negligence if pedestrian on pavement is suddenly hit in the back by a car, and defendant calls no witness). *Laurie* v. *Raglan* [1942] 1 K.B. 152. *Barkway* v. *South Wales Transport Co., Ltd.* [1950] 1 All E.R. 392.

[23] *Mahon* v. *Osborne* [1939] 2 K.B. 14.

[24] [1944] K.B. 421. *Brookes* v. *L. P. T. B.* [1947] 1 All E.R. 506 (liable where train left station with carriage door open). In *Woods* v. *Duncan* [1946] A.C. 401, at pp. 434–5, Lord Porter differed from the Master of the Rolls, and held that Lieutenant Woods was not in sole control.

[25] (1873) L.R. 8 Q.B. 161.

In the former case a child of four travelling in an express train from Edinburgh to London went into the corridor and fell out through an offside door. There was no evidence to show how the door was opened. On these facts it was impossible to say that the offside doors were continuously under the exclusive control of the railway company. In *Gee's Case*, the train started from Westminster, and at Victoria, two stations further on, the plaintiff got into an empty compartment. Before reaching the next station, he stood up to see how the signals worked, leaned slightly against an offside door which flew open. He fell out and recovered damages for his injuries. The offside doors were sufficiently under the control of the railway company, the distance between the stations was short, and the balance of probabilities was that the company had not performed their duty to fasten the doors when the train left Westminster, and not that other passengers had interfered with them. Generally, the alleged act of negligence and the accident occur together, such as falling flour bags, cars mounting pavements, but in actions against manufacturers and others within the principle of *Donoghue* v. *Stevenson* the alleged negligence may occur before the accident; control during the process of manufacture without control at the time of the injury may be enough, *e.g.*, *Grant* v. *The Australian Knitting Mills* [26] (excess of sulphites in woollen pants), *Chapronière* v. *Mason* [27] (stone in a bun).

(2) The harm or accident must be of such a kind that it does not ordinarily happen when those who have control exercise reasonable care; for example flour bags falling from an upper window, cars mounting pavements, a stone in a bun, a brick falling from a viaduct. Past experience of circumstances leads to the conclusion that the negligence of the defendant is the most likely explanation of the accident. It is enough that in the ordinary course the odds in the inferences are decidedly in favour of the defendant's negligence [28]; the harm must be such that *would* not (not *could* not) happen without such negligence,[29] and a mere possibility of harm is not enough.[30]

[26] [1936] A.C. 85. A contrary view was taken by Lewis J. in *Daniels* v. *White* [1938] 4 All E.R. 258 (carbolic acid in ginger beer). 14 C.B.R. 1936, pp. 287–94. F. C. Underhay, 24 A.L.R. 1950, pp. 194–8, R. W. Baker; 55 L.Q.R. (1939) pp. 6–9, 352–3.

[27] (1905) 21 T.L.R. 633.

[28] *Langham* v. *Governors of Wellingborough School and Fryer* (1932) 101 L.J. K.B. 513, *per* Greer L.J. at p. 518.

[29] *Ibid.*, *per* Scrutton L.J. at p. 520.

[30] *Ballard* v. *North British Ry.*, 1923 S.C.(H.L.) 43, *per* Lord Dunedin at p. 54. *The Crouch* (1950) 84 Ll.L.Rep. 447 is a useful case showing when the maxim does not apply.

It is the ordinary experience of mankind and not of the expert which it is relevant to consider. Scott L.J. was decidedly against the experience of the expert, for the person who has to draw the proper and natural inference immediately arising when defendant's counsel submits there is no case is the judge and not the jury. 'How can a judge have sufficient knowledge of surgical operations to draw such an inference. . . . What does he know of the ordinary course of things on a complicated abdominal operation? And if he does not know, is expert evidence admissible to supply lack of judicial knowledge?'[31] Goddard L.J. dissented on this point,[32] and Mackinnon L.J. did not deal with it. Pollock sums it up by saying, 'The *Court* will take judicial notice of what happens in the ordinary course of things, at all events to the extent of using *their knowledge* of the common affairs of life to complete or correct what is stated by witnesses. *Judges* do not affect, for example, to be ignorant that the slipping of one passenger out of several thousands in hurrying up the stairs of a railway station is not an event so much out of the run of pure accidents as to throw suspicion on the safety of the staircase'.[33] Where a person allowed an ordinary fire to burn in his fireplace, and where the room was set on fire by a cause unknown, but probably by a spark from the fire, there being nothing to show it was an improper fire, or larger than usual, or that the grate was too small, Goddard C.J. held that *res ipsa loquitur* could not apply, for 'Everybody knows fires occur through accidents which happen without negligence on anybody's part'.[34] So that ordinarily it is the basis of experience common to mankind, reflected in the first instance in the judge as a man of the world, supplemented sometimes by the evidence of experts, and, when the case goes to the jury, it is the experience of the reasonable man on all the evidence. To the judge it is something akin to taking judicial notice, to the jury it is common sense.[35]

In most of the typical cases, both requirements considered above are present, and the inference then points to the defendant's negligence. In an ordinary case of negligence the careless acts or omissions must be stated and proved, whereas in a *res ipsa loquitur* situation, the facts and circumstances of the accident itself without more are prima facie evidence of negligence.[36] But inferences may

[31] *Mahon* v. *Osborne* [1939] 2 K.B. 14, at p. 23.
[32] *Ibid.* pp. 45–7.
[33] *Torts*, 14th ed., 358, citing *Crafter* v. *Metropolitan Ry.* (1866) L.R. 1 C.P. 300 (italics supplied).
[34] *Sochacki* v. *Sas* [1947] 1 All E.R. 344, at p. 345.
[35] 37 *California Law Review* (1949), Dean Prosser, p. 193.
[36] *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1926) 95 L.J.K.B. 237 '. . . You may presume negligence from the mere fact that it happens, because such a thing would not happen without negligence'. *Per* Scrutton L.J. at p. 241.

be drawn where one only is present, and of course where a prima facie case is established by evidence. du Parcq L.J. said that *res ipsa loquitur* sometimes means that certain facts are so inconsistent with anything but the negligence of the defendant, that any jury on proof of those facts who found that negligence was not proved, would be giving a perverse verdict. Sometimes it falls short of that and means merely that on proof of certain facts an inference of negligence may be drawn by a reasonable jury although the precise circumstances are not fully known.[37] Greer L.J. regarded it as only a branch of a larger rule, that if the proved facts render it reasonably probable, in the absence of explanation, that the defendant was negligent and that the damage was caused by that negligence, it is for the jury to say whether the case is or is not established. This makes it doubtful whether there is much point in its continued existence as a separate rule.[38]

The common application of the maxim is to prevent injustice which might otherwise arise when the plaintiff is not in a position to produce direct evidence of the defendant's conduct, *e.g.*, where the evidence is meagre, the plaintiff having at the outset no means of knowledge of the facts bearing on the cause of the accident or the care exercised by the defendant, and these are, or ought to be within the knowledge of the defendant.[39] Further the defendant may be reluctant to explain facts which might involve him in liability, so that direct evidence is absent. This is as old as the maxim itself,[40] but Pollock C.B. in *Byrne* v. *Boadle* points out that the defendant had a right to remain silent, and is not called upon by himself or by his witnesses to go into the witness-box until a case has been made out against him. But, he adds, to say that 'the plaintiff is to call witnesses from the upper warehouse, where the thing happened, or to go about and inquire what the cause was, would be unjust'.[41] The validity of the rule that where the

[37] *Easson* v. *L. N. E. Ry.* [1944] K.B. 421, at p. 425.

[38] *Langham* v. *Governors of Wellingborough School and Fryer* (1932) 101 L.J. K.B. 513, at p. 518. L. M. N. Hodson in 62 S.A.L.J., 1945, pp. 408–13, writes convincingly that *res ipsa loquitur* should cease to be treated as if it were a separate little branch of the law of evidence.

[39] *Barkway* v. *South Wales Transport Co., Ltd.* [1950] 1 All E.R. 392, *per* Lord Normand at p. 399. *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1926) 95 L.J.K.B. 237, *per* Bankes L.J. at p. 239. It applies only where 'the plaintiff, in complaining, has no knowledge or means of knowledge, as to what the actual cause of the accident was, all that he is in a position to say is that it occurred in reference to a matter of which the person of whom the plaintiff was complaining had full control and full knowledge . . .'.

[40] *Scott* v. *London & St. Katherine Dock Co.* (1865) 3 H. & C. 596, at p. 600, *per* Blackburn J. 'There is an old rule of pleading, that less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading. Applying that here, is not the fact of the accident sufficient evidence to call upon the defendants to prove there was no negligence?'

[41] (1863) 33 L.J.Ex. 12, at pp. 15–6.

facts are peculiarly within the knowledge of the defendant the burden of disproving them lies upon him has been challenged.[42] It may affect the quantum of evidence demanded in the first instance, but does not necessarily shift the burden of proof; some prima facie evidence must be given by the plaintiff to cast the burden of disproof on the other side.[43] The courts have been largely influenced by these considerations in applying the maxim. The defendant's superior knowledge is not a vital factor, but the point is rather, that the plaintiff has no knowledge of the actual cause of the accident.

It must be remembered that 'the *res*' can only speak so as to throw the inference of fault on the defendant in some cases *where the exact cause* of the accident is unexplained.[44] If the exact facts are known, it ceases to be a case of *res ipsa loquitur* and the solution must be found whether, on the facts as established, negligence is to be inferred or not.[45] The court has to decide on the balance of proof on each side. Accordingly, where the plaintiff tells the court the cause of the accident, the court must inquire whether the cause, if proved, was due to negligence on the part of the defendant; the mere happening of the accident is not enough to make a prima facie case against him.[46]

It has been said that the maxim has no application to cases between master and servant where negligence on the part of the master has to be proved affirmatively.[47] In *Cole* v. *De Trafford*[48] Pickford L.J.'s view was that the maxim is more difficult to apply to a master and servant case because the nature of the accident must be more consistent with the master's personal negligence than other causes, such as negligence of a fellow servant. The evidence

[42] Halsbury, *Laws of England*, 2nd ed., Vol. 13, p. 546: 'In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively'.

[43] Phipson, *Manual of Evidence*, 7th ed., 23.

[44] *Ballard* v. *North British Ry.*, 1923 S.C.(H.L.) 43, *per* Lord Dunedin at p. 54.

[45] *Barkway* v. *South Wales Transport Co., Ltd.* [1950] 1 All E.R. 392, *per* Lord Porter at 395. 'If the cause of the accident is proved the maxim is of little moment', *per* Lord Normand at p. 399.

[46] *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1926) 95 L.J.K.B. 237. It was common ground that the *cause* of the actual occurrence, the breaking of the stub axle, was 'fatigue' of the metal, which could only be ascertained by breaking up the metal, and not by any external examination. 'You therefore start this case with this, that this stub axle broke from a *cause* which could not be discovered from inspection by the most careful examination. Now once you get at that, it seems to me that the whole idea of *res ipsa loquitur* is destroyed.' *Per* Scrutton L.J. at p. 241.

[47] Halsbury, *Laws of England*, 2nd ed., Vol. 23, p. 672, n. (*q*), citing *Paterson* v. *Wallace & Co.* (1854) 1 Macq. 748 H.L. (miner killed by fall of stone). Charlesworth *Law of Negligence*, 2nd ed., p. 536. 'When personal negligence of master is to be proved, it does not apply because "*res*" only speaks of negligence on the part of somebody, and not the personal negligence of the master'—citing *Cole* v. *De Trafford* [1918] 2 K.B. 528.

[48] [1918] 2 K.B. 528.

was very meagre, particularly as to how long the master had been in possession of the garage and its defective glass door. It would seem now that, since the doctrine of common employment has been abolished [49] and the maxim *volenti non fit injuria* is to be applied with caution to the servant,[50] there is no inherent reason why, in appropriate circumstances, *res ipsa loquitur* should not be applied to bring home negligence for which the master is responsible.

B. In this article consideration of space precludes a detailed analysis of the burden of proof that the maxim imposes on the defendant if he is to succeed in the action brought against him. Two main views are outlined, the conflicting opinions expressed in recent cases are collected, and some tentative suggestions are offered. It is well to remember that, before the liability of a defendant to pay damages for the tort of negligence can be established, the plaintiff has to prove (1) that the defendant owed to the plaintiff a duty to exercise due care, (2) that the defendant failed to exercise due care, (3) that the defendant's failure was the cause of the injury in the proper sense of that term.[51] This legal burden of proof which is fixed by the rules of substantive law remains throughout the trial on the plaintiff. To discharge this legal burden, the plaintiff must prove relevant facts and rely on any presumptions that arise. If he establishes a prima facie case of negligence, the burden, in the sense of adducing evidence, is then shifted to the defendant to rebut it. If he gives no answer, or an unsatisfactory one, the prima facie case may—and in most cases will—become conclusive, and judgment will be for the plaintiff. The plaintiff must establish negligence by a preponderance of evidence. If the court after weighing the evidence for the plaintiff and the defendant find it evenly balanced, the plaintiff has failed to discharge the legal burden and judgment will be against him.[52]

What is the effect of *res ipsa loquitur* in a situation where it applies? It is said to do no more than shift the burden of proof, or give rise to a presumption of negligence. Two situations may be considered, (a) where the defendant calls no evidence, and (b) where the defendant calls evidence.

[49] Law Reform (Personal Injuries) Act, 1948.
[50] *Bowater* v. *Rowley Regis Corporation* [1944] K.B. 476.
[51] *Woods* v. *Duncan* [1946] A.C. 401, *per* Viscount Simon at p. 419. *The Heranger* [1939] A.C. 94, *per* Lord Wright at p. 104.
[52] See *Phipson on Evidence*, 8th ed., pp. 27–35 (burden of proof), pp. 4, 661 (presumptions). It is generally agreed that the existing distinctions between the divisions of burdens and presumptions are difficult to maintain. See (1945) 61 L.Q.R. pp. 379–83, for convincing proof of this by Lord Justice Denning, and suggestions for a new classification. Macintosh and Scoble, *Negligence on Delict*, 3rd ed., pp. 361–70, give a very clear account.

(a) In the simplest kind of case, where the defendant submits there is no case to answer the judge is practically obliged to rule against him. It furnishes sufficient evidence of negligence to enable the case to go to the jury if the defendant offers no evidence, and thereupon the jury *may* find for the plaintiff. 'If nothing else is proved about how this cask tumbled out, *res ipsa loquitur*, the jury are entitled to find it tumbled out of negligence, that being the more probable way in which it happened'.[53] In *McGowan* v. *Stott* the plaintiff while walking along a footpath was struck down by the defendant's motor lorry. The Court of Appeal held the case ought not to have been withdrawn from the jury. Atkin L.J. said that the simple question was whether at the close of the plaintiff's case there was evidence fit to be submitted to the jury in support of the case, in that on the whole it tended to show a greater probability that the fact as alleged by the plaintiff was correct than the contrary; and he said also, that the simple issue is sometimes obscured by the use of a formula such as *res ipsa loquitur*. 'All one wants to know is whether the facts of the occurrence do as a matter of fact make it more probable that a *jury may* reasonably infer that damage was caused by want of care on the part of the defendants rather than the contrary'.[54] The judge has to decide whether there is any evidence at all to go to the jury; he has to direct them upon the burden of proof as a matter of law, but not on the question of burden of proof as a matter of fact, for that is a question of fact for the jury.[55] As in every case, if their verdict is such that no reasonable jury could have reached, the case may be sent for a new trial. Whether such evidence exists to go to the jury has been said to be a matter of 'right thinking' rather than of law.[56] When the facts are such that the maxim applies, then the plaintiff's task is rendered easier since a presumption of fault arises from the accident, whereas in other cases the plaintiff's evidence has to make out a prima facie case.

(b) In cases where the defendant calls evidence, does it mean (1) that the maxim can be relied on by the plaintiff to discharge the burden of proof of negligence so as to place on the defendant the ultimate burden of proving affirmatively that he exercised all reasonable care, in effect, to prove by a preponderance of all the evidence that the accident was not caused by his negligence; and that if he fails to discharge that burden, the plaintiff wins? Or

[53] *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1926) 96 L.J.K.B. 237, *per* Scrutton L.J. at p. 241.
[54] (1930) 143 L.T. 217, at pp. 219–20.
[55] *Pickup* v. *Thames Insurance Co.* (1878) 3 Q.B.D. 594, *per* Thesiger L.J. at pp. 605–6.
[56] 14 C.B.R. (1936) 291, Underhay.

(2) does it mean that the burden of proving negligence is still on the plaintiff, the burden of going forward with the evidence being on the defendant to give a reasonable explanation as to how the accident may have happened without his negligence, so that when all the evidence is in, if it is evenly balanced the plaintiff loses. Professor Baker thinks that the ' predominant theory is that *res ipsa loquitur* raises a legal presumption of negligence which the defendant must rebut by showing he took all reasonable care ', and a writer in the *South African Law Journal* suggests that the effect of recent English decisions is to transfer to the defendant the legal onus of disproving negligence.[58] The authorities are conflicting, and dicta in recent decisions afford no sure guidance.

The first view is supported by *Angus* v. *The London Tilbury and Southend Ry.* where an express train pulled up suddenly to avoid running over a passenger who was crossing the line at the station. The sudden stoppage caused injury to a passenger in the express. In the trial before Phillimore J. the jury found for the plaintiff. On an application by the defendants for judgment or a new trial, Lord Loreburn said: ' The defendants had to prove they were blameless in respect of the cause of the accident. They had to show both that they acted reasonably and properly in stopping the train, and also that the cause which led to the necessity of stopping the train was not brought about by any negligence on their part '. The Court of Appeal dismissed the application.[59]

The second view is supported by Lord Dunedin in a dissenting judgment in *Ballard* v. *North British Ry.*[60] which has been approved by Langton J. in *The Kite* [61] and in *The Stranna,*[62] by Bucknill J. in *The Mulbera,*[63] and by Willmer J. in *The Aralia* [64] where he reviews the previous cases. In substance it amounts to this. The maxim does not amount to a presumption of law that the defendant is guilty of negligence. The defendant need not prove that his negligence did not cause the accident, if he adduces evidence which produces a reasonable explanation of how the accident may have happened without his negligence, the plaintiff is left where he began—he has

[58] 24 *Australian Law Journal* (1950) 194–8; 67 *South African Law Journal* (1950) 245–56. ' C. J. J.'; see also 14 C.B.R. (1936) 480–3 G. W. Paton; *ibid.*, 287–94; F. C. Underhay; 37 *California Law Review* (1949) 217–32, William L. Prosser; 20 C.B.R. (1942) 705–6; 63 H.L.R. (1949–50) 643–8, W. A. Seavey.

[59] (1906) 22 T.L.R. 222, at p. 223. *Winnipeg Electric Co.* v. *Geel* [1932] A.C. 690, dicta of Lord Wright at p. 699, and quoting *The Merchant Prince* [1892] P. 179, at pp. 187, 188–9, where the defence pleaded was inevitable accident.

[60] 1923 S.C.(H.L.) 43; at p. 54.

[61] [1933] P. 154, at pp. 166–70; *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* [1937] 1 K.B. 534, *per* Lord Wright M.R. at p. 539.

[62] [1937] P. 130, at pp. 147–8.

[63] [1937] P. 82, at pp. 90–2.

[64] (1949) 82 Ll.L.Rep. 884.

to prove affirmatively that the defendant was guilty of negligence. The burden on the defendant is a temporary and provisional one, he discharges it if he succeeds in furnishing an alternative explanation of the accident which the court considers reasonable, and which is consistent with there being no negligence on the part of the defendant. The cogency of the fact of the accident then disappears. Willmer J. approved the statement of Langton J. in *The Kite*, that if the defendant gives a reasonable explanation which is equally consistent with the accident happening without the defendant's negligence as with his negligence, that is, when there is no preponderating probability one way or the other, he has again shifted back the burden of proof to the plaintiff to show that it was the defendant's negligence that caused the accident.[65] This seems inconsistent with Asquith L.J.'s view that when a balance has been tilted one way, it cannot be redressed by adding an equal weight to each scale.[66]

In *Woods* v. *Duncan*[67] the speeches of Viscount Simon, Lords Russell and Simonds, on the assumption that the maxim did apply in that case, are in agreement, that it only shifts the burden of proof in that a prima facie case is assumed to be made out throwing on the defendant the task of proving that he was not negligent, but this does not mean that he must show how and why the accident happened. Lord Simonds said it was sufficient if the defendant satisfied the court that he personally was not negligent, and the court would be more easily satisfied of this '*if a plausible* explanation which attributes the accident to some other cause is put forward, but this is only a *factor in the consideration of probabilities.* The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered; yet if the *court is satisfied by his evidence that he was not negligent*, the plaintiff's case must fail'. Of course, it is clear in any case that if the defendant proves by evidence that he was not negligent, the plaintiff must fail. Lord Simonds' statement seems to involve that the burden of adducing evidence on the defendant must be such as to prove that he was not negligent. But it does not follow that he must do so by a preponderance of evidence, for the phrases 'plausible explanation', 'more easily satisfied', and 'consideration of the probabilities', are compatible with the view that when evidence is adduced, it is taken into consideration with the inference

[65] [1933] P. 154, at pp. 166–170.
[66] *Barkway* v. *South Wales Transport Co., Ltd.* [1948] 2 All E.R. 460, at p. 461.
[67] [1946] A.C. 401, at pp. 419, 425, 439. In *Ballard* v. *North British Ry.*, 1923 S.C.(H.L.) 43, *per* Lords Haldane, Finlay and Shaw—an onus lies in the first instance on the defendant to show that the accident was not due to his fault or negligence.

of negligence in deciding whether on the whole the balance of probability is in favour of the plaintiff or the defendant.

In *Turner* v. *National Coal Board*,[68] applying *Woods* v. *Duncan*, Tucker L.J., who gave the only considered judgment, observed that it was impossible to say that, because the defendant could not explain precisely how the accident happened an *inference* had to be drawn against him that his system was a negligent one and that he had failed to take reasonable care to provide a proper system and proper plant. If at the end of the plaintiff's case, as he thought, that burden had been cast on the defendant by the doctrine of *res ipsa loquitur*, he had discharged it, and the plaintiff's claim failed.

Barkway v. *South Wales Transport Co., Ltd.* was specifically held as a case of *res ipsa loquitur* by the Court of Appeal, and following *Woods* v. *Duncan* the maxim was treated as a rule of evidence. Scott L.J. said it raised a prima facie presumption of fault, rebuttable by the same defence as is open to any defendant accused of negligence against whom the plaintiff's evidence has made out a prima facie case, and when the plaintiff has done that the onus is said to shift to the defendant. ' In a case where *res ipsa loquitur* the *onus starts* on the defendant and requires him to prove affirmatively that he has exercised all care, but that proof is greatly facilitated if he can show that the event which caused the plaintiff damage happened through some cause for which no blame can attach to him, even though it cannot be specifically identified; if it can . . . his task . . . is achieved. If he thus succeeds in demonstrating positively the probable operation of such cause, whether specifically identifiable or not, the onus is then discharged, and the presumption of fault on his part ceases, and the plaintiff is left in the position of having failed to prove his case '.[69] This statement seems to favour the view that the defendant is not bound to prove that he was not negligent, the onus remains on the plaintiff to prove the negligence of the defendant. If so, it is at variance with Asquith L.J.'s summary of the position as to onus of proof: ' (i) If the defendants' omnibus leaves the road and falls down an embankment, and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst *per se* is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one

[68] (1949) 65 T.L.R. 580, C.A.: 66 L.Q.R. (1950) pp. 8–9.
[69] [1948] 2 All E.R. 460, at pp. 468–9.

way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Laurie* v. *Raglan Building Co., Ltd.*, where not a tyre-burst but a skid was involved. (iii) To displace the presumption, the defendants must go further and *prove* (*or it must emerge from the evidence as a whole*) either (a) that the burst was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or (b) if they can point to no specific cause, that they used all reasonable care in and about the management of their tyres'.[70]

The Court of Appeal was satisfied on the evidence given that the burst was due to an impact fracture, caused by one or more heavy blows on the outside tyre, that such fracture might occur without leaving any visible marks on the outer tyre, that due care had been taken in the system of tyre inspection, and that therefore, there was no negligence; accordingly, judgment followed for the defendants. This was reversed by the House of Lords, on the ground that the omnibus company had not taken all the steps they should have taken to protect passengers because they had not instructed their drivers to report heavy blows to tyres likely to cause impact fractures. The cause of the accident was a defect of the tyre which might have been discovered by due diligence on the part of the company, and they were liable although it was not possible to affirm that the fracture would have been discovered by the exercise of due diligence. The speeches of their Lordships make it difficult to discover any clear and consistent conception of the effect of *res ipsa loquitur*. In any event, as there was evidence on the causation of the accident and on the care exercised by the respondents, the maxim had no application. Lord Porter after quoting Erle C.J. in *Scott* v. *London Dock Co.*, states that the doctrine is dependent on the absence of explanation, and that it is the duty of the defendants if they wish to protect themselves to give an adequate explanation of the cause of the accident.[71] Lord Normand stated that if the cause of the accident is proved the maxim *res ipsa loquitur* is of little consequence; it is *no more than a rule* of evidence affecting onus.[72] Later he states that the onus is on the respondents since they alone are in possession of the relevant facts and that the evidence, though not in all respects as ample and clear as it might have been, is sufficient for the decision of the case without resort to the rules of onus.[73] Lord Radcliffe did not think

[70] *Ibid.* p. 471.
[71] [1950] 1 All E.R. 392, at pp. 394–5.
[72] *Ibid.* 399.
[73] *Ibid.* 400.

the appellant was entitled to judgment because of any special virtue in the maxim *res ipsa loquitur*, it was nothing more than a rule of evidence. Much more was known than the bare fact of the omnibus falling down the embankment. 'The true question is not whether the appellant adduced some evidence of negligence, but whether on all the evidence she proved that the respondents had been guilty of negligence in a relevant particular'.[74] There is no onus then on the defendant to prove that he was not negligent.

The House was agreed that where as here the facts are sufficiently known, the question ceases to be one when the facts speak for themselves, and the solution must be found by determining whether or not on the established facts negligence is to be inferred; and, on the known facts given by the defendants as an explanation of the accident, their Lordships found they had been guilty of negligence.

These recent cases do not clear up the question as to what is the burden imposed on the defendant; the phrases employed are that he discharges it though he cannot explain how the accident happened provided, 'he establishes', 'shows', 'proves affirmatively', 'satisfies the court' that he was not negligent. It is 'a duty if he wishes to be protected to give an adequate explanation' of the cause of the accident. Must the defendant *prove* the accident occurred without his negligence, or need he only give a reasonable explanation of how it could have happened without his negligence?[75] The tendency of the later decisions is to make his burden heavier and to favour the first alternative. It is relevant to note that Lord Cave L.C., who agreed with Lord Dunedin in *Ballard's Case*, pointed out that the question was one of fact, whether the accident was due to the breaking of a defective coupling—the property of third persons, a defect which could not have been discovered by ordinary care on the part of the defendants—or whether it was the negligence of the engine driver in going at too fast a speed and suddenly stopping, which caused or contributed to the accident. All this was proved in evidence, and unlike the majority, he came to the conclusion that the accident was due entirely to the breaking of the defective link.[76] Lord Dunedin's view is not referred to in the judgments in *Duncan* v. *Woods* and later cases, except in *The*

[74] *Ibid.* 403. Cf. *Stone* v. *Bolton* [1950] 1 K.B. 201, at pp. 211–2. Jenkins L.J., dealing with onus of proof, said that the fact of the plaintiff being struck by a cricket ball hit out of the ground was sufficient to place on the defendants the burden at least of showing that the event was one which they (1) could not reasonably have foreseen, or (2) had taken all reasonably practical steps to prevent.

[75] Gibb, *Collisions on Land*, 5th ed., pp. 22–3.

[76] *Ballard* v. *North British Ry.*, 1923 S.C.(H.L.) 43, at p. 48.

Aralia.[77] Further, in *O'Hara* v. *Central S.M.T. Co.*[78] his view was carefully analysed. No mere explanation as to how the accident might have happened without negligence on the part of the defendant can suffice, it must be given in evidence and amount to sufficient proof to prevail over the prima facie case which up to that point has been accepted as proving the plaintiff's case.[79] Lord Dunedin's distinction between 'explanation' and 'proof' in discharging a prima facie case, is not in harmony with the majority view [80]—'the remainder of the story may displace the inference of negligence, but if it does not, the inference remains'.[80] The Lord President (Normand) preferred the clearer discussion of *res ipsa loquitur* in Lord Shaw's speech, and thought that what Lord Dunedin in his dictum had in view was a necessary safeguard in applying *res ipsa loquitur* as if it expressed a legal presumption; it is merely a presumption of fact, and its force depends on the facts of each case.[81] Nowhere could he find that Lord Dunedin relied on an explanation short of full legal proof, for he held it proved that the speed of the engine was not excessive, which excluded the specifically pleaded negligence of the driver, and he also held it proved that the link broke because of a latent defect not discoverable by ordinary examination.[82]

Some confusion has been caused by a tendency to regard the maxim as a principle of law, and as du Parcq L.J. pointed out, it is to be remembered that in cases like *Gee* v. *The Metropolitan Ry.*[83] and many others, 'the question before the court was not whether negligence was to be regarded as proved as a matter of law, but whether the jury was entitled to find negligence proved'. 'There is danger, particularly in these days when few cases are tried with juries, of exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense.'[84] It would be well to remember the dictum of Lord Dunedin that 'it is not safe to take the remarks which have been made as to the principle of *res ipsa loquitur* in

[77] (1949) 82 Ll.L.Rep. 884.
[78] 1941 S.C. 363.
[79] Lord Carmont at p. 392.
[80] At p. 393.
[81] Lord President (Normand), p. 377.
[82] At p. 378. *Elliot* v. *Young's Bus Services*, 1946 S.L.T. 145, is another Scots case in which the 'overdriven metaphor' and 'its consequences, whatever they may be' as to onus of proof are considered, particularly the judgment of Lord Mackay. The facts were almost identical with the *Barkway Case*, held *res ipsa loquitur* inapplicable, and the motor company liable.
[83] (1873) L.R. 8 Q.B. 161.
[84] *Easson* v. *L. & N. E. Ry.* [1944] K.B. 421, at p. 426. 'None of the reported cases really lay down any principles of law. They only show that in the circumstances of the case there was evidence on which the jury could find a verdict for the plaintiff', *per* Goddard L.J. at p. 423.

one class of cases and apply them indiscriminately to another class'.[85] Every accident is different from every other, the cases illustrate the inferences, that is, 'reasonable deductions from the evidence, which may have the validity of legal proof. It is always a matter of inference to attribute an occurrence to a cause, varying from practical certainty to reasonable probability, and a hiatus in the direct evidence may be legitimately bridged by an inference of fact from facts observed and proved'.[86] The facts of the accident give rise to a presumption of fact of the defendant's negligence, they may speak in an audible whisper or they may cry out aloud. The quantum of evidence which the defendant must adduce to rebut it depends on the strength of the presumption against him. Many of the cases considered show that judges have failed to agree as to the inference to be drawn, and as to what is required to rebut it, and how it is to be done—proof by evidence that the defendant was not negligent, or a reasonable, true and sufficient, practical explanation how the accident could have happened without negligence. In *Donoghue* v. *Stevenson* Lord Macmillan said: 'There is no presumption of negligence in a case such as the present, nor is there any justification for applying the maxim *res ipsa loquitur*. Negligence must be both averred and proved'.[87] Four years later the maxim was applied by the Privy Council in such a case, *Grant* v. *Australian Knitting Mills*[88] where the inference was raised that the injury either happened, (1) because of the defendant's negligence in using an improper system of manufacture, or (2) because of the carelessness of his employees in failing to carry out the system as it ought to be carried out. To escape liability the rebutting evidence would in effect be affirmative proof that neither the defendant nor his servants had been negligent—an almost impossible task.[89] The Court of Appeal treated the accident to the omnibus in the *Barkway Case* as an instance of *res ipsa loquitur*, the House of Lords held that it was not. It has been suggested that the maxim may be used as a straddle between 'fault' and 'strict liability', and that this may account for the confusion of its treatment in the cases.[90]

[85] *Ballard* v. *North British Ry.*, 1923 S.C.(H.L.) 43, at p. 53.
[86] *Jones* v. *G. W. Ry.* (1931) 144 L.T. 194, *per* Lord Macmillan at p. 202.
[87] [1932] A.C. 562, at p. 622.
[88] [1936] A.C. 85. Manufacturers called evidence to show their process was designed to guard against leaving irritant chemicals in the finished article. Plaintiff conceded it was properly designed but Lord Wright said that if excess sulphides were left in the garment 'that could only be because someone was at fault', p. 101.
[89] Underhay, 14 C.B.R. (1936), p. 294; 55 L.Q.R. (1939) pp. 6–9, 352–3.
[90] Wright, 26 C.B.R. (1948), p. 69.

The dicta in the cases are far from clear, and not without much misgiving the following conclusions are tentatively suggested:—

1. A case of *res ipsa loquitur* raises a presumption that the negligence of the defendant caused the accident. If the defendant calls no evidence relating to the issue of negligence, it is a sufficient foundation for finding liability against him. The plaintiff has discharged his burden of proof by his evidence of the accident and its surrounding circumstances. It would have been well if the doctrine had been confined to this situation, for it depends 'on the absence of explanation'. Difficulties have arisen, because in cases where the defendant has called evidence by way of explanation, which of course he must do if he wishes to protect himself, the views expressed by the court as to what the defendant has to do in particular cases by way of rebutting evidence, and the effect of that evidence, tend to be treated as principles of law. It should depend on the facts of each particular case and should vary according to the strength of the plaintiff's case.

2. If the evidence adduced by the defendant, although he is unable to prove how the accident happens, satisfies the court that he was not negligent, the plaintiff fails.

3. If the evidence of the defendant taken in conjunction with the fact of the accident (provided it is of a kind within the statement of the rule by Erle C.J. in *Scott* v. *London and St. Katherine Docks Co.*) leaves the evidence as a whole in even scales, just as consistent with the defendant not having been negligent as with his having been negligent, then the plaintiff has failed to establish his case. But as suggested above these are not true cases of *res ipsa loquitur* for where the defendant has given his evidence the question is not 'does the accident of itself point to the defendant's negligence, but is it right on the evidence as a whole to find him guilty of negligence'.[91]

4. In short, there are two views as to the burden of proof resting on the defendant, (1) that the burden of disproving negligence is on the defendant, (2) that there is a burden on the defendant to produce a reasonable explanation but it does not extend to disproof of negligence. There are dicta to support both, but the second view seems preferable.

[91] *Woods* v. *Duncan* [1946] A.C. 401, *per* Lord Porter at p. 435.

INTERNATIONAL CONGRESS ON PRIVATE LAW

In July last the International Congress on Private Law, promoted by the International Institute for the Unification of Private Law, was held in Rome. About 200 jurists, from some thirty countries, took part, representing many international organisations, including UNO and the Council of Europe, and sixty universities. It is regrettable that only three English Universities sent representatives, Birmingham, Manchester and Cambridge. The Cambridge representative was Mr. D. I. C. Ashton-Cross.

The purpose of the Congress was twofold, first to discuss the problems of unification of private law, and second to study on a comparative basis certain particular aspects. Thus in addition to papers and discussions strictly confined to problems of unification, as, for instance, 'The Method of Unification', 'Perspectives and Limits of Unification of Private Law', and 'Possibility of Establishing a Uniform Law on the Liability of Carriers' there were contributions and discussions on such comparative subjects as—to mention one or two only—'The Binding Force of Contracts', 'The Influence of the Canon Law on the Law of Contract' and 'The Notion of Trusts'.

The Congress has shown that despite the differences of their positive rules there are none the less principles common to all countries. The difficulties of unification were obvious and admitted, but the hope was generally expressed that in the framing of law in any particular country advantage should be taken of the accumulated experience of other countries. One recommendation only was made, that the International Institute should convene a committee of experts representing the Anglo-Saxon and continental systems to study the unification of the law of Bills of Exchange.

The main achievement of the Congress was to draw attention to the present position of the task of unification, and to allow the interchange of ideas on the problems involved. The conclusion was reached that unification is not only desirable but necessary, and that only a genuine effort is needed to arouse a common juridical spirit throughout the world. The present lack of that common spirit, which hardly facilitates the work of unification, was commented on and deplored in more than one of the discussions.

It is felt that the task of unification will produce more practical results if co-ordination of the different international organisations which study the problems can be achieved, based on a full *entente*, and coupled with a mutual exchange of information on the works undertaken, reciprocal communication of annual programmes, and collaboration on fixed subjects by several organisations. This linkage of international organisations should, the Congress suggested, have as its complement national or local committees for each country. Such a committee is in process of formation for Great Britain.

NOTES ON RECENT CASES

ADMINISTRATION—PAYMENTS BY EXECUTORS UNDER MISTAKE OF LAW —EQUITABLE RIGHT IN PERSONAM

Ministry of Health v. *Simpson* [1950] 2 All E.R. 1137.

The House of Lords have affirmed unanimously the Court of Appeal's judgment in *Re Diplock* [1948] Ch. 465, noted *ante*, Vol. 10, p. 260. The next-of-kin sought to recover from the Ministry of Health (successors to the Westminster Hospital) the sum of £4,000 paid into the Hospital's Rebuilding Fund Current Account. It was not contended in this appeal that the next-of-kin could assert any right at law or in equity to follow or trace the £4,000 into the assets of the Ministry of Health. The only question to be determined was whether the Ministry were under a personal liability in equity to refund to the estate of the testator the money wrongfully paid to their predecessors. That money had been spent before any notice was received doubting the gift's validity.

Lord Simonds in the one judgment held that 'the reasoning and conclusions of the Court of Appeal are unimpeachable' and found the Ministry liable.

He reaffirmed that the equitable remedy in personam could be given for a mistake of law—here a mistake by the executors and not the beneficiaries—as well as for a mistake of fact, emphasising that the remedy is not analogous to the common law action for money had and received. (*Quære* whether the rule may be different if the mistake of law was as to the general law, and whether it applies only to the mistakes of personal representatives.)

Secondly, he repeated that the underpaid legatee has first to exhaust his remedy against the executors who made the wrongful payment. (Contrast Lord Justice Denning's article in 65 L.Q.R. (1949), p. 37.)

Thirdly, although Lord Simonds did not mention the question of notice for a volunteer who takes the money in good faith, in holding that the equitable rule 'did not excuse the wrongly paid legatee from repayment because he had spent what he had been wrongly paid' (p. 1147), it is suggested that the innocent volunteer is worse off in respect of a claim in personam than he is in respect of a claim in rem. This may result, unless restricted to the present facts and pending actions over Diplock's estate, in what could well be an 'unconscionable' rule.

P. Stanley.

BILLS OF SALE—ATTEMPTED GIFT OF FURNITURE BY HUSBAND TO WIFE WHILE CO-HABITING WITH HER BEFORE MARRIAGE—VALIDITY OF GIFT—BILLS OF SALE ACT, 1878.

Hislop v. *Hislop* [1950] W.N. 124 (C.A.).

In 1943 a husband's first wife left him, and another woman came to live with him. In 1944 the husband, by a written document, made a gift of furniture to this woman. The first wife divorced her husband in 1947 and he married the second woman. The husband fell into arrears with payments of maintenance to his first wife and she sought to levy execution on the furniture in his house. The second wife claimed that it belonged to her.

The Court of Appeal, affirming the decision of the county court, held that the second wife was unable to defeat the claim of the first wife. Evershed M.R. declared that the document of 1944 was not effective to pass title unless the second wife could show that she had possession. If she had possession, the decisions in *Ramsay* v. *Margrett* [1894] 2 Q.B. 18, and *French* v. *Gething* [1922] 1 K.B. 236, would apply and the husband would no longer be the possessor or apparent possessor within the meaning of section 8 of the Bills of Sale Act. In order to establish her title, since the transaction is a gift otherwise than by deed, the second wife must show (i) an intention to give and (ii) a delivery of possession; and in order to satisfy the second requirement she cannot rely on the doctrine that 'possession follows title', for this involves a circular argument.

In refusing to apply *Ramsay* v. *Margrett*, Evershed M.R. does not follow the dictum of Goddard L.J. in *Youngs* v. *Youngs* [1940] 1 K.B. 760, when he says 'I think the cases show that where a man is living openly with a mistress, instead of a wife, the doctrine of *Ramsay* v. *Margrett* would apply to transactions between them, whereby one *sells* to the other the contents of the house in which they are living'. His refusal is presumably based on the distinction that by a *sale* title passes and possession follows it in cases of doubt; but in a *gift* otherwise than by deed, possession must be first proved before title can be established.

The Master of the Rolls would express no opinion as to whether the marriage in 1947 would cure any defect in the second wife's title which existed between 1944 and 1947.

C. N. W.

CHARITABLE TRUST—CRITERION OF PUBLIC BENEFIT

Gilmour v. *Coats* [1949] A.C. 426.

The House of Lords have affirmed unanimously the Court of Appeal's judgment holding that the purposes of the Carmelite Priory were not charitable (see C.L.J., Vol. 10, p. 104). It was an association of strictly contemplative nuns who engaged in no external activities for the benefit of anyone outside themselves. Cases such as *Re Caus* [1934] Ch. 162 were discussed and doubted. Although a trust for the advancement of religion is generally speaking charitable, there must be the element of public benefit. On the question of proof, Lord Simonds said (p. 446), 'It does not follow from this that the court must accept as proved whatever the particular Church believes. . . . A gift to two or ten or a hundred cloistered nuns in belief that their prayers will benefit the world at large does not from that belief alone derive validity any more than does the belief of any other donor for any other purpose'. In what circumstances is the public benefit resulting from divine worship susceptible of legal proof? (See Lord du Parcq, pp. 452–453). It does not seem possible to find an answer in the judgments.

Argued for the first time in this case was the idea that the element of public benefit is the same in religious and educational trusts—on these facts equating the qualification for admission into the community to an endowment of a scholarship open to public competition. This 'speciously logical' argument which ignores 'the historical process of the law' (per Lord Simonds, p. 449) was rejected, yet Lord Simonds added obiter (p. 450) that he thought an educational trust for cloistered students who should leave no records of their study would not be a charity.

P. S.

CHARITABLE TRUST—PUBLIC ELEMENT—COMMON EMPLOYMENT—EDUCATIONAL TRUST—POVERTY CASES

(a) *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* [1951] 1 All E.R. 31, H.L.

(b) *Re Coulthurst, Decd.* [1951] Ch. 193.

(c) *Re Scarisbrick* [1950] Ch. 236.

(a) In the first case a settlement (which, unless charitable, infringed the rule against inalienability) was executed to provide for the education of children of employees or former employees of the British-American Tobacco Company. The employees numbered

more than 110,000. The question to be decided was whether the trust was charitable, and therefore valid. The House of Lords considered that no distinction could be drawn between the children of the employees and the employees themselves. Following, therefore, *Re Compton* [1945] Ch. 123 (C.A.) and *Re Hobourn Aero Components* [1946] Ch. 194 (C.A.) they held by a majority (Lord MacDermott dissenting) (i) that common employment was not a quality sufficient to render the employees a section of the community, such a relationship being essentially private, not public: (it would be different according to Lord Normand if the trust were in favour of all employees in the tobacco industry), and (ii) that the exceptional treatment accorded to the 'poor relations' cases would not be extended to educational trusts. Although the House did not have to decide whether the poverty cases where no public element was to be found were rightly decided, Lord Simonds suggested that owing to the length of time during which these cases had remained unchallenged, the House might be unwilling to overrule them.

Although the principle is clear that common employment will not clothe a trust with a sufficient public character to make it charitable, it remains undecided whether the employees of a company which has a monopoly over an industry are a section of the community.

(b) *Re Coulthurst* is distinguishable on the ground of 'poverty'. A bequest was made which, on construction, was limited to a bank's poor employees or former employees and their families. Vaisey J. held that the beneficiaries although fewer than in *Gibson* v. *South American Stores* [1950] Ch. 177 (C.A.) were a section of the community and therefore the trust was charitable. It is submitted that this reason for the judgment, if valid before, cannot stand after *Oppenheim's Case*, *supra*. However, the decision may be upheld (following *Gibson's Case*) on the ground that this trust was for the relief of poverty.

(c) In *Re Scarisbrick*, Roxburgh J. had to consider whether a gift in favour of such relations of the testatrix's son and daughters as in the opinion of the survivor should be in needy circumstances, was charitable. The gift was one for distribution within the period allowed by the rule against inalienability. Roxburgh J. held, following a dictum of Sir W. Grant in *Att.-Gen.* v. *Price* (1810) 17 Ves. 371, that in the 'poor relations' cases a distinction should be drawn between gifts infringing and gifts not infringing that rule. The former had been uniformly held to be charitable, whereas the latter ought, in his lordship's opinion, to take effect as private trusts.

It would seem to follow from this decision that although a trust confined to the perpetuity period cannot, though it be held non-charitable, be void for inalienability, this very confinement may convert into a private trust what would otherwise be a charitable trust with all its attendant advantages.

D. G. R.

CONFLICT OF LAWS—PETITION FOR NULLITY—POLYGAMOUS FORM OF MARRIAGE — LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1949, S. 1 (1) AND (2)

Risk v. *Risk* [1950] 2 All E.R. 973.

In 1938 the woman petitioner, who was domiciled in England, went through a polygamous form of marriage in Alexandria with a man who was at all relevant times domiciled in Egypt. Since 1946 the petitioner had resided in England. She now sought a decree of nullity, claiming that the court had jurisdiction under the Law Reform (Miscellaneous Provisions) Act, 1949, and that according to the law of her premarital domicil she had no capacity at the date of the ceremony to contract a polygamous marriage.

Barnard J. conceded that the petitioner had the requisite residence qualification, but considered that the words 'husband' and 'wife' in section 1 (1) restricted the relief under the Act to monogamous marriages. This interpretation was based upon *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130. On the assumption that the marriage was void, and that a decree would be merely declaratory, he nevertheless dismissed the petition since the petitioner, if successful, might apply for maintenance. The court might then have to afford relief in respect of a polygamous marriage.

This attitude towards polygamous marriages is hypersensitive. It is one thing to refuse relief in respect of a valid marriage which is polygamous; it is quite another to refuse relief where the validity of the polygamous union itself is questioned. Here jurisdiction was refused, although the marriage was alleged to be void on the ground of the wife's incapacity to contract a polygamous union. Consequently, the court refused to declare that the parties were never husband and wife for the very reason that, in the eyes of the court, they were not 'husband' and 'wife'. The question of capacity to contract a polygamous marriage was inexplicably subordinated to that of the character of the marriage itself. It is submitted that the problem of ancillary relief is severable from the main issue, and that it would have been consistent with principle

to entertain the petition. Otherwise an admittedly nugatory ceremony is allowed to oust the jurisdiction, and a formal decree is refused for reasons which implicitly embody the substance of such a decree.

R. A. MacC.

CONTRACT—FRUSTRATION—UNCONTEMPLATED TURN OF EVENTS—POWER OF COURT TO QUALIFY LITERAL TERMS OF CONTRACT

British Movietonews, Ltd. v. *London and District Cinemas, Ltd.* [1951] 1 K.B. 190 (C.A.).

In 1941 the plaintiffs contracted to supply 'news-reels' to the defendants, the agreement being terminable at four weeks' notice by either party. Following the Cinematograph Film (Control) Order, 1943, the parties made a supplemental agreement providing, inter alia, as follows: 'That during the continuance of the Cinematograph Film (Control) Order, 1943 . . . the principal agreement shall remain in full force and effect until such time as the said order is cancelled . . .'. On February 24, 1946, the Emergency Powers (Defence) Act, 1939, the parent statute of the Order of 1943, expired, but the Order was continued owing to the shortage of raw film. The parties continued to perform their obligations under the two agreements until May 24, 1948, on which date, the 1943 Order being still in force, the defendants gave four weeks' notice to terminate the agreements, and stopped taking the plaintiff's news-reels. The plaintiffs successfully contended before Slade J. that both agreements were still binding and that the defendants must continue to pay the plaintiffs the agreed weekly rental for their news-reels.

The Court of Appeal unanimously reversed this decision. Denning L.J., in whose judgment Bucknill L.J. and Roxburgh J. concurred, applied the recent case of *Parkinson* v. *Commissioners of Works* [1949] 2 K.B. 632 (C.A.), of which he said (at p. 201): 'The judgments show that, no matter that a contract is framed in words which taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense . . . [and] will do therein what is just and reasonable'.

Denning L.J. treated *Parkinson's Case* as marking a new departure in the law of frustration. It is suggested that *Parkinson's*

Case was a decision on very special facts, turning on the interpretation of terms. In the present case the terms are unambiguous; the parties elected to undertake obligations determinable by an event over which neither side could have any control. Moreover, when it became apparent that the event was to be deferred, neither took any steps to bring the contract to an end, but continued to act for over two years on the assumption that it remained binding. Perhaps *Parkinson's Case* does not offer a secure basis for Denning L.J.'s judgment, and Slade J.'s opinion may be defended.

D. W. S.

CONTRACT—ILLEGALITY—AGREEMENT FOR LOAN IN CONTRAVENTION OF EXCHANGE REGULATIONS — LOAN NOT MADE — SECURITY FOR REPAYMENT IRRECOVERABLE

Bigos v. *Bousted* [1951] 1 All E.R. 92.

Mrs. Bigos agreed to lend Mr. Bousted a sum of money abroad in contravention of section 1 of the Exchange Control Act, 1947. He deposited a share certificate as security for the loan, which was never made. In an action brought on a written agreement to repay the loan, Mr. Bousted counterclaimed for the return of the certificate. Pritchard J. held that the deposit, being tainted with the illegality of the main agreement, was irrecoverable. The defendant was not allowed a *locus pœnitentiæ*, for the non-fulfilment of the illegal purpose was due not to his repentance, vide *Taylor* v. *Bowers* (1876) 1 Q.B.D. 291, but to the plaintiff's failure to perform her obligations, *Berg* v. *Sadler & Moore* [1937] 2 K.B. 158—where the illegal purpose was 'frustrated' by third parties.

While Pritchard J.'s statements as to illegality and a *locus pœnitentiæ* carry weight, it is respectfully suggested that the real point at issue was whether a security or pledge bailed under an illegal contract may be recovered. Where there is an out and out transfer of goods or money the transferor intends to divest himself of all rights of ownership and possession and can only recover by showing the circumstances of the transfer, *i.e.*, by setting out the illegal contract. A pledge, however, remains the property of the debtor, who has an immediate right to possession if the loan is repaid or is never made. Can a claim be based on the right to possess without invoking the illegal contract? Such a claim was allowed by the Court of Appeal in *Bowmaker, Ltd.* v. *Barnet Instruments, Ltd.* [1945] 1 K.B. 65, in which du Parcq L.J. awarded damages for conversion of goods bailed under an illegal contract of hire-purchase, for the non-payment of instalments had terminated

the rights of the defendants under the agreement. Distinguish *Taylor* v. *Chester* (1869) L.R. 4 Q.B. 309; and see *ante*, Vol. 10, pp. 249 *et seq.*

It is submitted that as these cases were not brought to the notice of the court, *Bigos' Case* cannot be cited as authority for the proposition that a pledge to secure an illegal loan can never be recovered.

J. L.

CONTRACT—INJURY TO PASSENGER—BREACH OF IMPLIED WARRANTY—COVENANT—INJURY TO TENANT ON STAIRCASE

(a) *Protheroe* v. *Railway Executive* [1951] 1 K.B. 376.

(b) *Devine* v. *London Housing Society* [1950] 2 All E.R. 1173.

(a) In *Protheroe's Case* a railway season ticket holder, when about to board a train, caught his foot in a crack between a paving stone and one of the coping stones along the edge of the station platform, belonging to the defendants, with the result that a bone in his foot was fractured.

Parker J. held: ' . . . there must be a contractual duty in relation to the premises which the passenger is bound to use for the purposes of access to the train, or for dismounting from the train, and although access to the premises is what one might call ancillary to the actual contract of carriage, it seems to me that in relation to those premises . . . over which a passenger is going to step to mount the train there is an implied warranty as to the premises being reasonably safe'. The crack being in close proximity to the platform's edge, resulted in the premises not being reasonably safe. It is suggested that, even if the crack had not been so close to the edge of the platform, but in the waiting room, or anywhere on the station where it would be reasonable for a person, on the premises under a contract of carriage, to go, such premises are still sufficiently ancillary, for a warranty of reasonable safety, as to such premises, to be implied.

(b) In *Devine's Case*, where the landlords were in occupation of the staircase, and a tenant was injured by falling in the dark on the unlit stairs, Croom-Johnson J. refused to imply an obligation to light the stairs in the covenant, because there could be no certainty as to the hour until which the stairs should be lit, and the learned judge would only imply a certain obligation. It is respectfully suggested that this raises the certainty required to an unusually high degree. Moreover, the installation by the landlords of an

'erratic' control system of lighting, installed to save fuel, was a relevant factor, as this was incompatible with the obligation to ensure reasonable safety on the staircase.

It is interesting to speculate how the courts may differ in implying, in covenants, obligations of reasonable safety of premises, as opposed to warranties to the same effect, in contracts.

F. R. F.

CONTRACT—REPUDIATION—ANTICIPATORY BREACH

William Cory & Son, Ltd. v. *City of London Corporation* [1951] 1 K.B. 8.

In a contract, with the defendant corporation acting as the sanitary authority, the plaintiffs agreed to use, for the removal of refuse, barges fitted and maintained with temporary coamings. Subject to this, they agreed to observe bye-laws made by the port health authority. In April, 1948, the corporation acting as the health authority, sealed new bye-laws, to take effect in November, 1950, requiring vessels transporting refuse to be fitted with permanent coamings and close-fitting hatches. At that date the contract had a prospective life of twenty years.

It was not disputed that the additional burden would make the contract commercially impracticable, and that it would be frustrated when the new bye-laws became enforceable. Lord Goddard C.J. disallowed the plaintiff's claim that the sealing of the new bye-laws constituted a repudiation of the contract entitling the contractors to treat it as rescinded in April, 1948. The doctrine of anticipatory breach could not arise as the defendants were not guilty of any wrongful act. For the purpose of repudiation there must be a 'conscious act' contrary to performance of the contract. Though the corporation was 'one and indivisible' its duties were distinct. A bye-law of general application issued by virtue of one power could not be construed as the repudiation of a contract undertaken for another purpose, although the latter might be incidentally affected.

The learned judge concurred in the assumption of the parties that the contract would be frustrated in November, 1950. The point is worthy of consideration in the light of the express covenant to comply with the bye-laws of the health authority. Perhaps the distinction between the various duties of a corporation may be too wide—if the regulation had been passed with the specific intent of repudiating the contract, judgment would have gone the other way. Finally it should be noted that breach is but one form of discharge,

but not every breach ipso facto operates as a discharge. The earlier cases solved the problem by way of a distinction between independent and dependent promises; the modern tendency is to rely upon the analogy of condition and warranty in order to answer the question 'Has the very foundation of the contract been destroyed?'

J. C. R.

CONTRACT—SALE OF GOODS—INNOCENT MISREPRESENTATION—CLAIM TO RESCIND EXECUTED CONTRACT—SALE OF GOODS ACT, 1893

Leaf v. *International Galleries* [1950] 2 K.B. 86 (C.A.).

The respondents sold Leaf a painting of Salisbury Cathedral, representing in the contract that it was by Constable. Five years later, discovering it was incorrectly attributed, Leaf sought rescission for innocent misrepresentation. No claim was made for damages for breach of condition or warranty. On the authority of *Angel* v. *Jay* [1911] 1 K.B. 666, the county court judge held that a completed contract cannot be rescinded for innocent misrepresentation. Leaf appealed.

Observing that Leaf had elected not to pursue a remedy open to him, namely, damages, the court unanimously dismissed the appeal on the ground that the five years' delay between completion and claim precluded rescission. Their lordships agreed that a misrepresentation as to the painter of a picture affected its quality but not its nature. The Court of Appeal found it unnecessary to decide whether a contract once completed may be rescinded at all for innocent misrepresentation—a matter upon which their lordships' views differed markedly.

Assuming the authorship to be a condition Denning L.J. stated that there was 'acceptance' within the Sale of Goods Act, s. 35, which precluded rejection; *a fortiori* it barred a claim to rescission for innocent misrepresentation. A contract for the sale of goods induced by a material innocent misrepresentation may result in equitable rescission after execution. Leaf could have rescinded within a reasonable time. *Seddon* v. *North Eastern Salt Co.* [1905] 1 Ch. 326 is not good law. *Solle* v. *Butcher* [1950] 1 K.B. 671 overrules *Angel* v. *Jay*.

To Jenkins L.J., dealing with equitable rescission, it seemed probable that since *Solle* v. *Butcher* the general proposition, applied in *Angel* v. *Jay*, that no executed contract can be rescinded for innocent misrepresentation is unduly wide. It still applies to conveyances of land. His lordship left open the question of its

application to contracts for chattels passing by delivery, declining to say whether Leaf could have rescinded within a reasonable time.

Evershed M.R. inclined to the view that to accept delivery of a chattel bought on the faith of an innocent misrepresentation precluded equitable rescission. *Solle* v. *Butcher* cast further doubt upon *Seddon* v. *North Eastern Salt Co.*; however, it is unnecessary to decide whether it still is of full effect and validity. Even though qualified, the case deserves some weight when the general application of the doctrine has to be considered.

Seddon v. *North Eastern Salt Co.* and *Angel* v. *Jay* have emerged with their former doubts neither dispelled nor confirmed.

J. J. L.

CONTRACT—SALE OF LAND—WHETHER TIME OF ESSENCE—RIGHT TO FORFEIT DEPOSIT AND RE-SELL

(a) *Smith* v. *Hamilton* [1951] Ch. 174.
(b) *Rickards* v. *Oppenheim* [1950] 1 K.B. 616, C.A.

(a) After contracting to purchase a dwelling-house, the purchaser informed the vendor that she would not be able to complete on April 4, the appointed day. On April 5, the vendor replied that he would not exercise his rights until April 19. The purchaser did not complete and the vendor purported to forfeit her deposit on April 19 : he re-sold the house on April 21. On May 2, the purchaser offered to complete. The National Conditions of Sale were incorporated in the contract and were held not to make time of the essence for completion. Condition 25 gives the vendor the right to re-sell the property and forfeit the purchaser's deposit, if the purchaser does not complete in accordance with the conditions of sale.

In an action for the return of the purchaser's deposit, Harman J., held (1) neither the statement that the purchaser could not complete on the appointed day, since it was not an anticipatory breach, nor the failure to do so, were improprieties permitting the vendor to make time of the essence: (2) By April 19, there had been no breach of the time stipulation for completion, because a reasonable time had not elapsed since the appointed day and, therefore, the rights of re-sale and forfeiture of deposit arising under Condition 25 had not accrued on that date.

The second part of this decision rests on the ground that, when time is not of the essence of a contract, there can be no breach of the time stipulation for completion until there has been a failure to

complete within a reasonable time of the appointed day. The same reasoning was applied in *Thorpe* v. *Fascy* [1949] Ch. 649. In both cases it was suggested that the date fixed for completion was not an ' essential ' part of the contract and the failure to observe it gave no right of action. These decisions appear to be inconsistent with *Phillips* v. *Lamdin* [1949] 2 K.B. 33 where, although time was held not to be of the essence of the contract the common law remedy of damages was given for an unexplained failure to complete on the appointed day.

(b) In *Rickards* v. *Oppenheim* time was initially of the essence in a contract for the building and purchase of a motor car body. The purchaser, after repeatedly waiving the initial stipulation, was held to be entitled (whether the contract was for sale of goods or for work and labour) to give reasonable notice re-making time of the essence. E. A. G.

CONTRACT—SERVICE AGREEMENT—STATUTE OF FRAUDS—QUANTUM MERUIT—NOTICE

James v. *T. H. Kent & Co., Ltd.* [1950] 2 All E.R. 1099 (C.A.).

The plaintiff was summarily dismissed after serving the defendant company as director for two years and seven months; he sued for wrongful dismissal, alleging an oral agreement of service for three years. The only written evidence of any agreement was a minute of the company approving his appointment and salary ' subject to a three-year contract with the company '. The defendants pleaded the Statute of Frauds.

Parker J. found for the defendants, holding: (1) There was an oral agreement for the three-year period, but it was unenforceable for want of an adequate memorandum; (2) a plaintiff cannot sue on an implied term as to reasonable notice where an unenforceable contract already exists.

The Court of Appeal whilst agreeing with Parker J. on the latter point, reversed his decision upon the strength of an alternative argument for the plaintiff not previously advanced. This was that no final agreement for the three-year period had been concluded, that the employment had consequently been of indeterminate duration and thus outside the Statute, and that a reasonable notice term could therefore be implied. On the construction of the minute this argument succeeded. Judgment and damages for the plaintiff.

The case is of interest for the dicta of Denning L.J. regarding actions brought upon unenforceable contracts of service. The

servant cannot sue upon an implied term as to reasonable notice, since that would mean implying a contract where an express contract already exists : *Britain* v. *Rossiter* (1879) 11 Q.B.D. 123. It is equally accepted that he can sue for remuneration for services already performed. In this case the action is generally regarded as brought upon a *quantum meruit*. Denning L.J., re-affirming his earlier criticism (41 L.Q.R. 79) of *Scott* v. *Pattison* [1923] 2 K.B. 723, suggests that this is not so. Where the servant has fully completed his service, the action, he suggests, lies not on a *quantum meruit* but on an executed consideration to which the Statute has no application. Where the servant has been unjustly dismissed before completion, 'the proper ground of the claim is not in contract at all but in restitution'.

Whether or not these distinctions prove acceptable, the present judgment constitutes another attempt to clear up the confusion surrounding the decision in *Scott* v. *Pattison* (*supra*).

A. R. C.

CRIMINAL LAW—BIGAMY—SEVEN YEARS' ABSENCE—SECOND MARRIAGE —PRECEDENT IN CRIMINAL APPEALS

R. v. *Taylor* [1950] 2 K.B. 368 (C.C.A.).

Lawfully married in 1925, the accused had, by 1948, gone through four other ceremonies of marriage. Indicted for bigamy in respect of the third and fourth 'marriages', he pleaded guilty, although he appeared to have been continually absent from his lawful wife since 1927, and had not known her to be alive during the intervening years. Upon application for leave to appeal against sentence, appellant's counsel informed the court that, following *Treanor* (1939) 27 Cr.App.R., where the defence of absence for seven years, under section 57 of the Offences against the Person Act, 1861, was held to be available only in the case of a *second* marriage, and not on any subsequent occasion, he had not raised it. The court, desiring that *Treanor* should be considered by a full Court of Criminal Appeal, granted leave to appeal against conviction. Delivering the judgment of that full court of seven members, Goddard L.C.J. unhesitatingly declared *Treanor* to be wrongly decided, and the conviction was quashed.

In substance the case decides that the interpretation of 'marrying a second time' is not to be confined to the second ceremony in point of time, but that the ceremony, whether second or later, charged in the particular indictment is the 'second' marriage for the application of the statutory defence.

The court took upon itself to reconsider, and disapprove its own earlier decision, and the precise significance of such a proceeding by a full court, as opposed to a division of the court, may be questioned. Justifying this departure from the rules of precedent in criminal appeals, Lord Goddard observed that

> 'The Court of Appeal in civil matters usually considers itself bound by its own decisions. In civil matters, this is essential in order to preserve the rule of *stare decisis*. This court, however, has to deal with questions involving the liberty of the subject, and if it finds that the law has been either misapplied or misunderstood in a decision which it has previously given . . . it is the bounden duty of the court to reconsider the earlier decision'.

For legislative suggestions to remedy the lacunae in the present law of bigamy, and a plea for a recasting of the scope of the offence, reference may be made to Professor Glanville L. Williams in (1950) 13 M.L.R. 417.

D. T.

CRIMINAL LAW—SENTENCE EXCEEDING TWO YEARS FOR COMMON LAW MISDEMEANOR—CRIMINAL JUSTICE ACT, 1948

R. v. *Morris* [1951] 1 K.B. 394 (C.C.A.).

The appellant was convicted on a charge of conspiring fraudulently to evade the payment of customs duties, and sentenced to four years' imprisonment. He appealed against sentence.

Giving the judgment of the Court of Criminal Appeal, Lord Goddard C.J. dealt with the contention that a sentence exceeding two years' imprisonment for a common law misdemeanor was not lawful.

At common law the judges had always retained a discretion as to the sentence for misdemeanor, as distinct from felony. Upon this the Bill of Rights, forbidding cruel or unusual punishments, had only imposed a general limitation. As a result, however, of the severity of conditions of imprisonment and the availability of penal servitude where longer incarceration was necessary, the courts became reluctant to impose more than two years' imprisonment. Under the Penal Servitude Act, 1891, an offence punishable by penal servitude could be punished instead by not more than two years' imprisonment. This reflected the practice of restricting imprisonment to a maximum of two years, but did not affect the legal power of the court in respect of common law misdemeanors. The Penal Servitude Act, 1926, probably inspired by the decision

in *R.* v. *Roberts and Morriss* (1926) 134 L.T. 635, strengthened by implication the accepted practice by permitting the substitution of penal servitude for consecutive sentences of imprisonment amounting in the aggregate to three or more years. But by 1948 the distinction in treatment between penal servitude and imprisonment with or without hard labour had largely disappeared, with the result that hard labour and penal servitude were both abolished by the Criminal Justice Act, 1948. Thus, the reason for this self-imposed limitation on sentences of imprisonment not governed by statute having disappeared, the present sentence should stand as being both lawful and in the circumstances just.

Common law misdemeanors vary greatly in turpitude, and in this respect one welcomes the decision that a judge is no longer limited, for reasons that have long lost their cogency, to a two years' maximum for a single offence. But against the value of this wider discretion must be set the anomaly that conspiracy to commit a crime may now, as in this instance, be punishable more severely than a conviction, on a single count, for the successful perpetration of that same crime.

J. K. N. D.

GIFT—DONATIO MORTIS CAUSA—DEPOSIT ACCOUNTS—SUFFICIENCY OF DEPOSIT BOOKS AS INDICIA OF TITLE

Birch and Another v. *Treasury Solicitor* [1950] 2 All E.R. 1198 (C.A.).

The deceased, while in hospital after a serious accident and in contemplation of death, delivered to the plaintiffs deposit books relating to accounts at the Post Office Savings Bank, a Trustee Savings Bank and at three joint stock banks. Roxburgh J. had held that there was not a valid *donatio mortis causa* of the sums standing in these accounts.

On appeal, Sir Raymond Evershed M.R., giving the judgment of the court, reversed this decision. He rejected the contention of the defendant (who relied on a statement of Luxmoore L.J. in *Delgoffe* v. *Fader* [1939] Ch. 928) that the books must contain all, or all the essential, terms of the contract out of which the chose in action arose, but approved, stating that it was the very essence of the matter, the defendant's contention that the books must be essential for the recovery of the chose in action. The grounds for the rejection of the first contention were that it was not a correct interpretation of the law, and that it was not discussed in *Re Dillon* (1890) 44 Ch.D. 76, the only case which the court considered to be

relevant. In that case it was held that a banker's deposit note was good indicia of title, and the fact that the particular deposit note did not state the rate of interest current at the date of deposit was considered of no real importance.

The court was in some difficulty as the evidence showed that, although prima facie the production of the deposit books was a term of the deposit, in practice this term was not generally insisted upon. The defendant failed, however, to discharge the onus of proving that the term was a dead letter, and so the court felt obliged to give effect to it (thus distinguishing *Delgoffe* v. *Fader* (*supra*)). Further difficulty was found in the fact that the deceased had requested the plaintiffs to pay an outstanding bill, out of the moneys given. In fact the claim to the account, out of which the bill was paid, was abandoned by the plaintiffs, yet the court suggested that in this case the request was not inconsistent with the parting of dominion.

S. P. G.

INTERNATIONAL LAW—IMMUNITY—PROPERTY—IN POSSESSION AND CONTROL OF STATES—BAILMENT

Dollfus Mieg & Compagnie S. A. v. *Bank of England* [1949] 1 Ch. 369; [1950] 1 Ch. 333 (C.A.).

During the German occupation of France, sixty-four gold bars belonging to the plaintiffs were forcibly removed to Germany. Subsequently, under the Paris Agreement on Reparations, they came into the possession of the Tripartite Monetary Gold Commission (Great Britain, France and America), who deposited them with the defendants to be held *in specie* at the Commission's disposal. The plaintiffs sued for their delivery up or damages for their conversion, alleging *inter alia* that they were not 'monetary gold' but the private property of the company. The bank moved to set aside the writ on the ground that the bars were in the possession or control of the three governments, two of which were foreign sovereign states who declined to submit to the court's jurisdiction.

Jenkins J. held that the possession and control remained in the bailors and that, although these were not proceedings *in rem*, the rule in *The Parlement Belge* (1880) 5 P.D. 197 and *The Cristina* [1938] A.C. 485 applied.

The plaintiffs appealed and the judgment was reversed on fresh evidence showing that, due to a clerical error, the Commission had been merely credited with an equivalent amount of gold and that thirteen of the bars had been actually sold as part of the bank's

pool. Somervell and Cohen L.JJ. were of opinion, however, that Jenkins J. was right on the facts as presented to him.

It is perhaps unfortunate that the bank was not content to plead only the governments' control over the bars. No member of the Court of Appeal expressed approval of Jenkins J.'s finding on possession, which proceeded upon a part of Mellish L.J.'s judgment in *Ancona* v. *Rogers* (1876) 1 Ex.D. 285, regarded by some as obiter, seeing that no bailment was actually found to exist. Even accepting its authority, the Master of the Rolls was of opinion that in the absence of any title (the governments were at best finders) possession could not conceivably remain in them as bailors. It is submitted that the introduction of any question as to the Sovereign's title is inconsistent with the authorities. The immunity depends on possession or control, not upon proprietory right. It is hard to see why more should be required when the property happens to be bailed. The fact of joint possession saved the British Government from liability under the Crown Proceedings Act, 1947, and the American from the argument that they were not entitled to an immunity not available to others in their courts.

C. H. de W.

MARRIAGE—NULLITY—FORMALITIES—CONSENT—FRUSTRATION

Kenward v. *Kenward* [1951] P. 124 (C.A.).

Kenward, of British domicil, married Nina, of Russian domicil, in Archangel in 1945. Two days later Kenward left Russia, and since then the Russian Government refused to allow Nina to leave or Kenward to enter Russia.

Kenward petitioned for a decree of nullity: (i) for failure to comply with formalities of the *lex loci celebrationis*; (ii) for lack of consent on his part due to his mistake in thinking they would be allowed to live together; (iii) because the marriage did not comply with the essentials of marriage according to English law, the Russian Marriage Code imposing no duty on the spouses to live together; (iv) because the marriage was frustrated.

Evershed M.R. and Bucknill L.J. held the marriage *void* on the first ground, differing from Hodson J. ([1949] 2 All E.R. 959) in their factual interpretation of section 2 of the Russian Marriage Code. They also held: (a) Mistake as to the future conduct of the Russian Government was not sufficient to nullify consent; (b) absence of a duty to live together did not constitute a union different from 'marriage' in English law as defined in *Warrender*

v. *Warrender* (1835) 2 Cl. & F. 488; (c) frustration had never been applied to marriage.

Denning L.J. concurred with his brethren, but held that the marriage was *voidable*, the condition 'that the parties should be allowed to live together' having been, by the *husband's intention*, imported by English law and having failed. It is submitted, however, that if the parties have capacity to marry according to the law of their respective domicils, have consented to marry and have been through the requisite formalities of the *lex loci celebrationis*, those formalities producing a status recognised by English law as marriage, English law imposes no conditions and the intention of either party is immaterial, merely showing whether or not there has been consent. If any of these requirements of English law is not satisfied the *contract of marriage* is *void* and (without any petition) is of no effect. If domiciled in England later, the contract of marriage having been completely performed by the ceremony, their *status as married persons* may be annulled for impotence or under the Matrimonial Causes Act, 1937, on grounds not including the enforced separation of the parties against their will (or any other *de facto* frustrating event). Only in such cases is the status of marriage *voidable*, *i.e.*, valid until one of the parties petitions for nullity and on a successful petition revoked *ab initio*.

D. R. S.

MERCANTILE AGENT—POSSESSION OF CAR WITH CONSENT OF OWNER—REGISTRATION BOOK OBTAINED BY TRICK—SALE OF CAR WITH BOOK—TITLE OF INNOCENT PURCHASER—FACTORS ACT, 1889, S. 2 (1)

Pearson v. *Rose & Young, Ltd.* [1951] 1 K.B. 275 (C.A.).

The plaintiff delivered his car into the possession of Hunt, a motor dealer and mercantile agent, to invite offers to purchase. Hunt obtained the registration book by a trick, and without the authority or consent of the plaintiff sold the car to Marshall who took it in good faith. The car was later purchased by the defendants. The plaintiff claimed damages for the conversion of the car.

The Court of Appeal found that although the plaintiff consented to Hunt possessing the car as a mercantile agent within section 2 (1) of the Factors Act, he had not intended to give possession of the registration book. The book, though not a document of title is strong evidence of title, and without it the price is materially affected. Denning L.J. referred to his dicta on this point in

Bishopsgate Motor Finance Corporation, Ltd. v. *Transport Brakes, Ltd.* [1949] 1 K.B. 322 at 337. The court held that a purchaser cannot obtain a 'clean' title without the registration book, and that 'goods' in the Act means the car together with the book. A sale without the book is not a sale in the ordinary course of business within the Factors Act, s. 2 (1); and the innocent purchaser is unable to acquire a good title.

Somervell and Denning L.JJ. considered *obiter* the position where a mercantile agent obtains possession of goods by larceny by a trick, as counsel for the plaintiff submitted that Hunt had so obtained the car. They dissented from the dicta of Fletcher-Moulton L.J. in *Oppenheimer* v. *Frazer & Wyatt* [1907] 2 K.B. 71, and followed the view of Bankes and Scrutton L.JJ. in *Folkes* v. *King* [1923] 1 K.B. 291, namely that it matters not whether the mercantile agent obtained possession by fraud or by what amounts to larceny by a trick, if the technical larceny arises merely from the agent's fraudulent intent. If the owner has consented to the mercantile agent having possession as such, the Factors Act applies: the innocent purchaser's title should not depend from the agent's secret subjective intent at the time of taking.

P. N. G.

PERPETUITIES—SETTLEMENT—LIMITATION DEPENDENT UPON VOID LIMITATION—SETTLOR'S INTENTION

Re Mill's Declaration of Trust [1950] 1 All E.R. 789; [1950] 2 All E.R. 292, C.A.

The interesting point in the case was the reference by Romer J. in the court of first instance to *Monypenny* v. *Dering* (1852) 2 De M. & G. 145 and *Re Thatcher's Trusts* (1859) 26 Beav. 365, and in particular, to a principle enunciated by Lord St. Leonards in the former case (at p. 180). It seems impossible to discover from the report (*e.g.*, at p. 792) whether this principle was essential to Romer J.'s decision. In the Court of Appeal he was affirmed on another ground. The principle was to the effect that, where an ulterior limitation is expectant upon a previous void limitation, then, even though the ulterior limitation is within the line of perpetuities, it will not have effect if it was not intended to operate unless the persons entitled under the previous limitations were capable of taking. On this principle certain observations may be made.

Firstly, it has been argued that the principle as originally

formulated was a dictum (see J. H. C. Morris, 10 C.L.J. at p. 403). Nevertheless, subsequent decisions have adopted it.

Secondly, any rule based on the hypothetical intentions of the settlor or testator is highly uncertain, since it is by no means sure that, had he been warned that one of his limitations was void, he would not have wished the subsequent valid limitations to be accelerated (see Gray, s. 254, J. H. C. Morris, 10 C.L.J. 392).

Thirdly, the principle (framed in terms of intention) does not account for the differing decisions in perpetuity cases. Lord St. Leonards used it to invalidate a certain class of ulterior limitations, namely those which, if allowed to take effect, would defeat the settlor's or testator's intention. Stirling J., however, in his dictum in *Re Abbott* [1893] 1 Ch. 54, 57, thought that it invalidated all limitations depending or expectant upon a previous void limitation. Yet the principle was not applied in *Re Canning* [1936] Ch. 309, or *Re Coleman* [1936] Ch. 528, nor does it explain the difference between those decisions on the one hand and *Re Backhouse* [1921] Ch. 51 on the other.

Romer J.'s remarks are interesting, following so closely on the recent article of Mr. J. H. C. Morris (*ante*, 10 C.L.J. 392), but it is doubtful whether they form part of the *ratio decidendi*, and moreover it is suggested that in the matter of ulterior limitations the rule of the intention is of as little value as the distinction between limitations 'dependent on' and those 'independent of' prior limitations.

P. C.

PERSONAL PROPERTY—COMMON INN—CAR STOLEN—NOTICE PURPORTING TO EXCLUDE LIABILITY—TRAVELLER—HOSPITIUM—INNKEEPER'S LIABILITY

(a) *Gee, Walker & Slater, Ltd.* v. *Friary Hotel (Derby), Ltd.* [1950] T.L.R. (Pt. 1) 59 (C.A.).

(b) *Williams* v. *Linnitt* [1951] 1 All E.R. 278 (C.A.).

(a) An employee of the plaintiffs, who used for business purposes a motor car belonging to the plaintiffs, arrived at the defendant's hotel, intending to stay the night. Having parked the car in the hotel forecourt and locked it, he went in to dinner, during which the car was stolen. His employers sued, to recover its value.

The Court of Appeal held the defendant liable, since he had failed to discharge the burden of showing that the guest had not taken reasonable care of his car.

(b) In *Williams Case*, the plaintiff stopped for a drink at the

defendant's inn, and while he was inside drinking with friends, his car was stolen. He had left it in the car park, where there was a notice exempting the proprietor from liability.

The Court of Appeal held the plaintiff could recover. They said that in such circumstances the plaintiff must prove he is a traveller. Although the present plaintiff lived locally, he fulfilled the test laid down by Wills J. in *Orchard* v. *Bush* ([1898] 2 Q.B. 284) of being 'a person who uses the inn, either for a temporary or a more permanent stay, in order to take what the inn can give'.

They held that the car park came within the inn's hospitium. 'It is, so to speak', said Denning L.J., 'an extended hospitium due to the extended notion of a traveller'.

The court held by a majority that the notice did not exempt the defendant from liability; but Denning L.J. (dissenting) thought that it should. He said it was not contractual, but was 'a limitation which the innkeeper is allowed to put on his strict liability because of the obvious risk involved if the goods are put in that place'.

These decisions, following as they do upon *Olley* v. *Marlborough Court Hotel* ([1949] 1 K.B. 532), indicate the high extent of innkeepers' liability,—a difficult one for them to limit, since, as Lord Esher M.R. said in *Robins* v. *Gray* ([1895] 2 Q.B. 501, 504), their 'duties, liabilities and rights . . . are founded not upon bailment, or pledge, or contract, but upon the custom of the realm'.

(For the distinction between an innkeeper's and a bailee's liability, see *Tinsley* v. *Dudley* [1951] 1 All E.R. 252.)

A. D. M. O.

SETTLED LAND—MORTGAGE—SETTLEMENT NOT DISCLOSED—SETTLED LAND ACT, 1925, ss. 18, 98, 112

Weston v. *Henshaw* [1950] Ch. 510.

In 1921, a father sold certain property in fee simple to his son who, in 1927, sold it back in fee simple. By his will the father settled the property on his wife for life, then to the son for life, remainder to the grandson, the present plaintiff. When the widow died in 1940 the trustees of the settlement, as her special executors, duly executed a vesting assent in favour of the son and handed over to him all the documents of title except the probate. In 1944 and subsequently the son charged the property by way of legal mortgage to secure advances from the defendant, the charge stating that the property had been conveyed to him in fee simple in 1921. On his death in 1946 what he had done was discovered. The grandson

sought in this action a declaration that the charges were void as against him.

Counsel for the defendant argued that the Settled Land Act, s. 18, 'Where land is the subject of a vesting instrument . . . any disposition by the tenant for life . . . other than a disposition authorised by this Act . . . shall be void', ought to be read subject to section 112 (2) which states that in the Act disposition means disposition by the tenant for life as such, unless the contrary appear. Section 98 (3), moreover, provides that trustees of the settlement shall not be liable for documents of title being in the possession of the tenant for life, so long as, if the settlement were not disclosed and it would appear that the tenant for life were absolutely and beneficially entitled to the land, they require that notice of the settlement be written on the document under which the tenant for life acquired his apparent absolute title: this section, counsel argued, was evidence that the innocent purchaser was intended to obtain the legal estate in exactly these circumstances.

But Danckwerts J. held, inter alia, that section 18 must not be read subject to section 112 (2) for 'it would make nonsense of section 18 to limit it to transactions under the Act, because it is essentially concerned with transactions not in pursuance of the Act which therefore makes it void'. He also rejected counsel's interpretation of section 98 (3). The mortgage was therefore invalid against the remainderman.

It would seem that this construction of the Act limits the scope of the old rule in favour of the bona fide purchaser of the legal estate: this it does by enacting that no legal estate can pass to him in this particular case. The misfortune to the present purchaser would have been avoided had the trustees complied with section 98 (3), by indorsing a notice of the settlement upon the conveyance of 1921.

M. S. S.

TORT—HUSBAND AND WIFE—DEPRIVATION OF CONSORTIUM—NEGLIGENCE OF THIRD PARTY

Best v. *Samuel Fox & Co., Ltd. and Another* [1950] 2 All E.R. 798.

The plaintiff brought this action for loss of her husband's consortium, he having become impotent as a result of injuries received through the defendants' negligence, while he was in their employ.

Croom-Johnson J. gave judgment for the defendants: any interference by them with the plaintiff's legal rights being innocent and unintentional, as they were unaware of her existence and owed her no duty of care.

He held that novelty was no bar to the action, as it consisted of an application of existing principles to fresh facts. Scrutton L.J. in *Place* v. *Searle* [1932] 2 K.B. at p. 512 said : ' A husband has a right to the consortium of his wife, and a wife to the consortium of her husband, and . . . each has a cause of action against a third party who, without justification, destroys that consortium '. Croom-Johnson J.'s judgment is based to a large extent on this and similar *enticement* actions, in which no action lay unless the defendant had wifully induced one spouse to break the consortium. These cases differ, however, from the present one in that they involve no tort committed directly against the enticed spouse.

The evidence in the present case shows that the defendants had no idea that the plaintiff's husband was married, and that there was nothing unreasonable in their not so knowing. The plaintiff does not come within the category of ' neighbour ' formulated by Lord Atkin in *Donoghue* v. *Stevenson*, and therefore it was held the defendants owed her no duty of care.

It is now firmly established, as in *Place* v. *Searle*, that the right to consortium is reciprocal, and of a similar nature to a master's rights in his servant. In *Mankin* v. *Scala Theodrome, Ltd.* [1947] 1 K.B. 257, Stable J. allowed the plaintiff to recover for loss of services when his servant was injured through the defendants' negligent omission, irrespective of whether they knew of the relationship between the injured party and the plaintiff.

It is submitted, therefore, that it may be possible for a wife to have a cause of action when her right to consortium is violated, even though that violation could not have been within the contemplation of the person committing a tort against her husband.

J. D. O.

TORT—NEGLIGENCE OF SERVANT—UNAUTHORISED PASSENGER—EXTENT OF MASTER'S LIABILITY

Conway v. *George Wimpey & Co., Ltd.* [1951] 1 All E.R. 363 (C.A.)

The plaintiff was injured while dismounting from the back of a lorry owing to the negligence of the defendant's driver. A notice in the cab, unknown to the plaintiff, authorised the driver to carry the defendant's employees only, and stated that other persons travelling on the lorry did so at their own risk.

Sellers J. ([1950] 2 All E.R. 331), found that the plaintiff was unaware that he had no right to travel on the lorry, and that the driver did not know that the plaintiff was not the defendant's servant. He decided the issue on the basis that the driver acted outside the scope of his employment, and that, therefore, the defendant was not liable. The action was treated as being completely covered by *Twine* v. *Bean's Express, Ltd.* [1946] 1 All E.R. 202, although there the plaintiff was expressly informed that he had no right to travel in the vehicle and so knew that he was a trespasser.

In dismissing the appeal, Asquith L.J. held that *Twine's Case* was applicable; the driver having no authority to give lifts to persons of the plaintiff's class. Thus, the plaintiff was a trespasser, in accordance with the rule that if A purports to give C leave to enter B's land and has no actual authority, C trespasses, although unaware of A's want of authority. The argument that the defendant was estopped from relying on the actual limits of the driver's authority to give lifts, failed, because knowledge of a practice of disregarding these limits was not proved.

Asquith L.J. also suggested that if the case were to be decided on the basis of the scope of employment of the driver then the prohibition would limit his scope of employment, unlike the case of *Limpus* v. *London General Omnibus Co.* (1862) 1 H. & C. 526, where the prohibition was held to relate only to the manner of performing the employment.

The questionable extension of the decision in *Twine's Case* lies in the fact that in the present case the plaintiff was unaware of his trespass, as the driver did not disclose the limitation of authority. The plaintiff had no notice of that limitation and came on the lorry with the permission of the person to whom the defendant had given apparently complete charge.

R. C. R.

TRUSTS—MUTUAL WILLS—AGREEMENT BY HUSBAND AND WIFE TO CARRY OUT EACH OTHER'S WISHES

Re Green (Decd.), Lindner v. *Green* [1951] Ch. 148.

In identical wills executed mutatis mutandis, the testator and his first wife recited an agreement to carry out each other's wishes, and, subject to the survivor's life interest, made similar dispositions of the combined estate. Their jointly owned house was devised to a hospital. The residue was divided into two equal shares, one moiety, which the testator regarded as his personalty, being

bequeathed to certain charities. The other half-share he treated as being those interests accruing to him under his wife's will: these were bequeathed according to his wife's wishes. After the first wife's death, the testator re-married. In a second will he purported to leave the whole estate to his second wife subject to certain pecuniary legacies, which were not always identical with those in the mutual wills.

Vaisey J. held, following *Dufour* v. *Pereira* (1769) 1 Dick. 419, and *Re Hagger* [1930] 2 Ch. 190, that the mutual wills set up an implied trust in favour of the hospital and the wife's intended beneficiaries. He excluded from the trust the husband's notional half-share in the will, holding that the second will took effect with respect to this half-share. He distinguished *Re Oldham* [1925] Ch. 75, a decision the other way, on the grounds that there was there no sufficiently compelling evidence of an agreement such as that expressly recited in these mutual wills.

The decision as reported seems to raise several difficulties. It is not clear why the house as a whole and only half the personalty should come within the trust. It is submitted that *Dufour* v. *Pereira* suggests that the whole estate would be covered by the trust. If, however, there was some reason why only half the property should become subject to the trust, then the fact that the house was held by husband and wife in joint tenancy would not be an insuperable obstacle to some sort of notional severance.

Finally, it is of special interest that the trust was held to attach both to property left by the first wife, and also to a contingent reversionary interest under a former settlement (for them equally or for the survivor of them) to which the husband became absolutely entitled some while after her death.

R. E. H.

BOOK REVIEWS

International Law and Human Rights. By H. Lauterpacht. [London: Stevens & Sons, Ltd. 1950. xvi and 475 pp. £2 10s.]

It may be prophesied that all that in the argument and conclusions of this important book may now be controversial will in a very few years, if the Western world is to survive, be settled law. For the thesis, which is presented with consummate skill and yet never overstated, is that there are already human rights in international law.

Part I is devoted to an exposition of the view, which may certainly be accepted, that the human rights provisions in the Charter of the United Nations are in no sense 'an artificial innovation altogether divorced from previous practice and out of keeping with the natural framework of international law'. For in the first place, as the first section of this Part shows, individuals both may and do derive rights from international law. That the enjoyment of such rights may not be accompanied by any procedural capacity does not impair the resultant potential or actual international legal personality of individuals. For the identity of the qualities of a subject, and of an administrator, of rights is fortuitous. So far as the status of the individual before international law is concerned in this regard, what is decisive is the intention of States. If that intention is that individuals shall directly enjoy rights, it must, and will, prevail in this sphere of international law as in any other. There is no difference in this respect between the question of the personality of the individual and that of the personality of organisations made up of States, which the opinion of the International Court of Justice has recently resolved.

In recent times the changing conception of the State has produced not a few manifestations of the requisite intention in the matter. The State has come more and more to be recognized as but a social engine, the mere delegate and device of 'the sovereignty of man'. And, as the second section of Part I explains, the politico-legal hypothesis which postulates and inspires that sovereignty is the idea of natural rights. That idea is not wholly alien to English legal thought. For, notwithstanding that English legal history seems so often to be something of a bye-way, leading off the main path of the world's legal development, as Professor Lauterpacht most properly reminds us in the chapter entitled 'The English Sources of the Doctrine of Natural Rights', there was a century when 'France went to school in England', or the French

revolutionary philosophers at least learned their Locke via the American colonists. The step from France to the American colonies is an easy one to trace. That from the colonies to the motherland is no less discernible. And here, incidentally, Professor Lauterpacht touches upon the most interesting historical circumstance that, until perhaps as recently as Disraeli's 'shot in the dark', the liberties of all Englishmen and their Rule of Law have been claimed *for* them rather than *by* them. He dismisses as irrelevant, we think rightly, that what, in their translation of the Great Charter, the seventeenth-century lawyers styled 'liberties' were wrested from John rather as franchises of a small class. For 'The vindication of human liberties does not begin with their complete and triumphant assertion at the very outset. It commences with their recognition in *some* matters, to *some* extent, for *some* people, against *some* organ of the State' (p. 131). With this, as has been said, there is no quarrel. But it would be interesting to know, if it is possible to know, why, until very recent times, the championship of liberty for all has been the prerogative of the few. It may be suspected that this circumstance has a very intimate connection—though whether of cause or effect is not clear—with the peculiar negative conception of rights entertained in England. Every schoolboy—or at least every candidate for Part I of the Law Tripos—knows that there is no right of free speech in England —merely a 'non-liability' to proceedings in every case where what is said is neither seditious, defamatory, nor blasphemous. When the time comes for the implementation of a Bill of Human Rights in England this difference of approach may well involve misunderstandings, if not worse, so that its full exploration would seem to be called for.

Part II is devoted to the thesis that, as a result of the entry into force of the Charter, the recognition and protection of human rights 'have now assumed the complexion of legal rights of individuals and of legal obligations of States and of the United Nations as a whole'. This is clearly a more controversial proposition, when it is recalled that the President of the International Law Commission abstained from voting in favour of the Declaration on the Rights and Duties of States on the ground that Article 6 thereof, which recites that it is the duty of a State 'to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language or religion', in his opinion 'went beyond the Charter of the United Nations, and beyond International Law at its present stage of development'. Professor Lauterpacht does not deny the controversiality of the question. But he holds that any such view as that of Professor Hudson is inaccurate. He supports his conclusion partly on the principles of interpretation of treaties and especially on the 'cardinal principle of construction according to which treaties must be interpreted in good faith' (p. 149).

And he deals at length with the objection that Article 2 (7) of the Charter, the celebrated exception of intervention in matters of domestic jurisdiction, compromises the human rights provisions. In this context the attention he gives to the meaning of the word 'intervention' as used in Article 2 (7) is much to be welcomed, though it is possible, as he indeed concedes, to differ from his restrictive, or technical, definition of that term as there used as 'a peremptory demand or an attempt at interference accompanied by enforcement or threat of enforcement in case of non-compliance' (p. 168). To answer his conclusions from the wording of the human rights provisions themselves is less easy. One can say, of course, that the Charter is not, or not wholly, a legal document, so that it may not always be susceptible of interpretation according to the canons of construction of treaties. But to that the retort may be made that the principle of good faith is not confined in its operation to strictly 'legal' obligations and that the provisions in question cannot be wholly meaningless or wholly lacking in normative quality.

One interesting incidental feature of the second part of the book is the full discussion of the American and Canadian restrictive covenant cases—those in some at least of which covenants discriminatory against negroes were held to be void. These raise the interesting question of the possibility of implementing the human rights provisions in common law countries by means of the doctrine known vaguely as 'public policy'. Having regard to the circumstance that the utilitarian paradox, that freedom of contract must embrace freedom to limit by contract the freedom of others to contract, has apparently been largely accepted by English law, this possibility is most attractive. For, since a limitation 'to A, but if he marry a Roman Catholic then to B' is apparently good in England, it is difficult to see how an English court could follow the High Court of Ontario in *In re Drummond Wren* (1945) 4 Ont.L.R. 778, and hold, on the basis of the Charter, that a covenant in a lease restrictive of user by a religious or racial minority is void. The question is complicated by the fact that international treaty law is not part of the law of England *per se*—a question with which, in so far as it affects the implementation of a Bill of the rights of man in general, Professor Lauterpacht deals fully elsewhere in this book. But one sees an avenue of escape from the dilemma in decisions such as that in *Foster* v. *Driscoll* [1929] 1 K.B. 470, wherein, notwithstanding the alleged principle that one State will not enforce the penal or fiscal laws of another, English public policy has been held to avoid a contract contemplating violation, for instance, of the customs regulations of a friendly foreign State.

In Part III Professor Lauterpacht comes himself more particularly to the problem of implementation. For he here prints, and comments extensively on, a draft Bill which follows in general

outline that contained in his book entitled *The International Bill of the Rights of Man*, published in 1945. And, as his publishers explain, this work is in some sense a successor and sequel to that. A noteworthy feature of the draft, which largely simplifies the problem of implementation in the common law countries, is that it is 'cast in the form of legal obligations binding upon States. The rights of individuals follow from these obligations. The draft does not lay down that "everyone" "everywhere" has the right to inviolability of his person or to freedom of religion. It imposes upon States the legal duty to respect these rights' (p. 323). There are twenty-nine articles on this draft. It would be impossible to attempt to summarise them here, or even to pick out the main features of them for discussion. It must suffice to say that they, and the commentary upon them, make absorbing reading and that many profitable hours can be spent working out their relation to the existing law of England and the changes which their implementation would involve. Part III contains, further, a full discussion of the Universal Declaration of Human Rights, with which Professor Lauterpacht has also dealt in the *British Year Book of International Law*, and the proposal for a European Court of Human Rights.

It is impossible, on a first reading, to do justice to this book. The matters with which it deals are so many-sided that the mind is constantly led away into speculations—particularly with regard to the status, present and future, of human rights in English law—and it becomes difficult to see the whole canvas clearly. Even a first reading, however, convinces one that here is a work which would have delighted the philosopher founder of the Chair of International Law at Cambridge. For here is one that disdains the facile hypothesis that the world, or the world's legal system, began anew at San Francisco, and seeks to relate the latest developments to the philosophical foundations of the classical law.

C. P.

Prerogativa Regis. Tertia Lectura Roberti Constable de Lyncolns Inne Anno 11.H.7. Edited by Samuel E. Thorne, Professor of Legal History and Librarian of the Law School, Yale University. [New Haven: Yale University Press. London: Geoffrey Cumberlege (Oxford University Press). 1949. li and 165 pp. Price 40s.]

In his Preface Professor Thorne mentions that Maitland suggested that *Prerogativa Regis* would well repay careful investigation. In this work Maitland's suggestion has been carried out. The Introduction of 45 pages by the learned editor examines the rules and background of the rules in *Prerogativa Regis* in the time of

Henry VII in the light of the reading by Robert Constable given the eleventh year of Henry VII, which he has edited, and a mass of other material, much of it in MS. The significance of the date, of course, lies in the use made by the Tudors of this statute to enforce their feudal dues. The Tudor interpretation was according to the learned editor more favourable to the Crown than could have been the intention of the framers of the statute.

The text of the reading (158 pages) is printed from a MS. in the Harvard Law Library, but the contractions and suspensions have been extended 'generally along the lines adopted by Miss Putnam in her edition of Thomas Marowe's reading of 18 Henry VII': (see p. xlviii). The MS. contains an incomplete copy of the whole reading, together with other readings, and the learned editor only prints the first ten lectures. He does not seem to tell us whether he thinks that it is a transcript from the reader's copy or merely a copy of what some hearer took down.

The voluminous and scholarly notes to the text contain comparative extracts from the texts of other readings on the same subject, particularly that attributed to Frowyk read in the Inner Temple in the same year (we wonder why he did not print this instead of Constable) as well as relevant extracts from other sources and in particular, of course, from the Year Books. As a work of painstaking scholarship it arouses the greatest admiration and, while this reviewer is too ignorant of this aspect of legal history to pronounce a mature judgment, so far as he can see anyone engaged on research into the incidents of tenure up to the reign of Henry VIII will find this book an invaluable and reliable mine of information (with a good Index).

At the same time we must utter a warning that this is essentially a source book for scholars (apart from the valuable introduction). Not only does the text contain no translation from the barbarous law French in which it was written, but most of the footnotes are composed of extracts in the same language. Even when the editor is citing from the Selden Society Rolls Series he prefers to give the original version and not the translation. May one, who has suffered a good deal of this barbarous law French and mediæval Latin, put in a plea that students of legal history, who often have little time or, perhaps, patience for the detailed study of queer tongues, should not be discouraged from reading what contemporary lawyers had to say. This would have called for no comment had it been an isolated example, but the great value of works such as that of Professor Woodbine, and Miss Putnam referred to above, is considerably diminished by this defect, which, after all, Maitland as the founder of the Selden Society in an age when leisure and training for languages was commoner, saw and avoided. The fact is that probably there are very few who can read law French or mediæval Latin with

sufficient fluency to allow the mind to play freely on the implications of what they are reading for a wider view of legal development. In my view these editions should provide those interested in legal history with something more than 'proof texts' and enable them to build up their own general background of the law of the period. Scholars, who are able and willing to pursue strange tongues in odd hands, are the salt of the historical earth and it is far from me to discourage them, but please let them remember that humbler ones may have something to learn and even to contribute.

We welcome the appearance of the texts of readings and particularly when edited with such learned care for the authorities affecting the text. The labour involved in finding the references to the other authorities and the Year Books must have been immense, and here can be found most of the authorities and of the matter relating to the position of tenants in chief vis-à-vis the Crown. This publication merely whets the appetite for more, because probably they would throw considerable light upon the manner of growth of the Common Law before the Reports played their part as precedent rather than example. So here, the number of direct references in the text to Year Books is infinitesimal compared with the number that the learned editor has incorporated into the footnotes.

Professor Thorne would put us further in his debt if he told more about these readings and what was their purpose and the purpose of those who kept copies of them. It seems scarcely probable that they were true student instruction as we understand the term. If they were, then students have changed a great deal. Indeed, as Professor Thorne points out, there is a title in Bellewe headed Frowyk's Reading in Prerogativa, which contained presumably extracts from his reading, which had found their way into *Brook's Abridgement* under a variety of headings. But still more we should like to see published some readings showing fundamental principles of the Common Law in growth. The Prerogativa by the sixteenth century is of greater constitutional than legal significance when the law of tenures provided opportunities for ingenuity but contributed little to the main development of English Law. By that time it was the growth of estates which was of prime importance to the history of law and possibly here was the typical growth of the Common Law of the period. Yet even Coke's reading on the Statute of Uses remains unpublished, although it has survived to some degree in at least two MS.

The surviving readings seem to be mostly concerned with statute, but perhaps some comparative study, such as we have in fact in this learned book, should show us much of the growth of the law of the period; how lawyers thought the general framework of the law should grow. This book is a wonderful beginning

that we hope may encourage others as well as the learned editor to cultivate this field.

H. P.

An Introduction to Legal Reasoning. By Edward H. Levi. University of Chicago Press. [Agents : Cambridge University Press. 1950. 74 pp. 15s. net.]

This little book is so good that it must be regretted that it was not made just a little easier for the student to understand. It contains an analysis, an illustration and an appraisal of the institution of legal reasoning, with particular reference to common law countries, and especially the United States. But the analysis occupies the first six pages only and is hard going for the beginner. Nevertheless he should try. The three succeeding sections deal with the use and making of precedents, the application of statutes, and the interpretation of the American Constitution. The illustrations used are the history of the 'inherently dangerous' rule from *Dixon* v. *Bell* to *Grant* v. *Australian Knitting Mills*, the interpretation of the Mann or White Slave Traffic Act of 1910, and the interpretation of the commerce clause of the Constitution. The main points can be grasped without detailed study. The final brief appreciation should be taken to heart by every lawyer, politician, administrator or diplomat who is trying to 'find a formula'.

Mr. Levi does not mention the 'rule of law'. Yet no future exposition of that institution would be complete without reference to his thesis. When rules of law are fixed and certain it is clear, as Aristotle realised, that there is 'a whole class of matters which cannot be decided . . . properly by rules of law'.[1] To meet this difficulty 'Law trains the holders of office expressly in its own spirit, and then sets them to decide and settle those residuary issues "as justly as in them lies"'.[2] The type of decision here envisaged is political, and is a necessary supplement to judicial decision in any community. But if rules of law are framed in vague and general terms, and the judges are well versed in 'legal reasoning', the class of matters suitable for 'decision by rules of law' is vastly extended—to the great advantage of the community and of the rule of law. New and unforeseen situations may thus be adequately dealt with without direct political intervention, and indeed where political agreement on taking the needed measures would be impossible. Mr. Levi makes these points clearly. 'The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas'

[1] Aristotle, *Politics* III, xv, § 6.
[2] *Ibid.* III, xvi, § 5.

(p. 3). 'The effort to find complete agreement before the institution goes to work is meaningless. It is to forget the very purpose for which the institution of legal reasoning has been fashioned' (p. 74).

A rapidly changing world is discovering that a certain ambiguity in the authoritative formulation of legal rules may be a greater virtue than attempted precision. Yet there must be limits to the flexibility of law in judicial hands. This limit is provided by the nature of legal reasoning, or as Mr. Levi calls it, reasoning by example, a type of reasoning with a logic of its own. Its product is the classification of new situations as falling inside or outside of existing categories, because of such similarity to situations already classified as to justify a similar treatment. 'The finding of similarity or difference is the key step in the legal process'. 'The problem for the law is: When will it be just to treat different cases as though they were the same?' (p. 2). The Goddess of Justice may be blind, but a judge must be able to perceive relevant similarities. In this perception he is assisted by the general trend of public and expert opinion, and by the arguments of the parties before him. 'The mechanism accepts the differences of view and ambiguities of words. It provides for the participation of the community in resolving the ambiguity by providing a forum for the discussion of policy in the gap of ambiguity. . . . The mechanism is indispensable to peace in a community' (p. 1).

The vital role of legal reasoning is seen to best advantage in the interpretation of a fundamental constitution, to least in the interpretation of statutes. In each case the starting point is a verbal formula which remains unchanged though new meanings be drawn from it, but the part played by legal reasoning increases proportionately with the difficulties of securing a revision of the formula. In case law the initial concepts themselves experience a gradual change as they embrace new situations and perhaps abandon old. 'The steps are these: similarity is seen between cases; next the rule inherent in the first case is announced; then the rule of law is made applicable to the second case' (p. 2). This brief account might well have been expanded. What is the rule inherent in a case? How does it differ from the rule announced by the court in deciding that case? And to what extent is the latter binding? Mr. Levi never uses the phrase 'ratio decidendi' and seems to regard all judicial pronouncements as 'dicta'. Nor does he point out that there are as many rules 'inherent' in a case as there are principles from which the decision in that case might logically have been deduced.

The principle of a case which is inescapably binding on succeeding judges is surely that one of such low degree of abstraction that it does not apply to facts differing from that case in more than irrelevant detail such as the persons, dates, or

amounts concerned. But the principle which a succeeding judge will announce, so that he may bind himself by it, is that one of the high generality and abstraction required so that it may be equally exemplified by the facts of the 'similar' case before him. Thus the judge 'induces' his principle from the case before him as well as from preceding cases. Each such 'induction' modifies a rule or concept in order that it may be applied. And the decision is inherent in the induced principle before the judge deduces it in his judgment. This does not involve the unpredictability of judgments. 'The probable area of expansion or contraction is foreshadowed as the system works. This is the only kind of system which will work when people do not agree completely'. Without an understanding of this truth there is no hope of a lasting union of democracy and the rule of law.

B. E. King.

Living Law of Democratic Society. By Jerome Hall. [Indiana: The Bobbs Merrill Co., Inc. 1949. 146 pp. (No price given.)]

To have insight into the nature of the Universe is one thing. To have insight into the nature of positive law is another. For the Universe is given: all experience is relevant data. But no experience can intelligibly be designated experience of 'law' until a meaning has been given to the term law,—until the term law has been defined. Jurisprudence thus begins by selecting, or giving itself, its own data. Whatever insights may precede the framing of a definition of law, they can only be designated insights into the 'nature of law' *after* the definition has been propounded. They are then insights into the nature of 'law as defined'.

On what insights does one rely in framing a definition of law? Professor Jerome Hall's first insight is that a study of the nature and condition of 'democratic' society has been neglected by legal scholars. His second is that the social systems of the so-called Western Democracies permit of the realisation of high-grade ethical values, and that 'power norms', called rules of law, play a large part in guaranteeing this realisation. These insights might lead one to the conclusion that democracy defined as 'majority rule' is inadequate as an ideal, and that legal scholars might propound a better definition. For instance—'a democratic society is one whose legal system provides *effective guarantees for the continuance of majority rule, e.g.*, for free speech, free press, independent judges, freedom of all persons from want and oppression, and free and frequent elections of its rulers'. In this way lawyers may stress the truth that majority rule may degenerate into tyranny, and tyranny into dictatorship, without necessarily infringing 'positive law'. It happened in Germany and it happened in Italy. A

condition of a continuing democracy is thus that it should maintain the necessary legal guarantees of its own continuance. Touch freedom of speech, for instance, and democracy in any worthwhile sense has begun to disappear.

The definition suggested is the result of insights into the conditions for the continuous survival of majority rule. It does not result from insight into the ' nature of democracy '. But it does result in a definition of democracy which may be worthy of allegiance as an ideal, in place of an ideal of ' majority rule ' which is illusory in the sense that its achievement need not produce the results expected—and may even contain the seeds of its own destruction.

The re-definition of democracy suggested above is not in fact Professor Hall's conclusion—though he gets very near it on p. 90. His insights lead him instead to distinguish ' democratic ' law as a special type of law. This is in itself defensible. However we define law it must admit of subdivision into many types. But he goes further and incorporates some of the special characteristics of ' democratic law ' into his conception of law in general (p. 85). ' In its totality, Law is a distinctive coalescence of form, value and fact ' (p. 131). As form it consists of ' hypothetical imperative judgments ' or ' normative propositions ' (p. 30). As fact it is the actualisation of legal rules in the exercise of rights and performance of duties (p. 122). As value it conforms to ' (a) ethical principles and (b) self-rule—the distinctive quality of the law of democratic society ' (p. 100).

One may readily admit that law so conceived is something worth fighting for. The concept expresses a valuable ideal. But it must also be realised that it expresses, to begin with, a definition of law rather than an ' insight into the nature of positive law '. And the questions that arise are (1) does the thing defined in fact exist, and if so, (2) how can we establish its existence? Professor Hall admits that a great deal of what is commonly called positive law is not law within his definition, *e.g.*, many rules governing the ' involved aspects of corporate activity and tax liability, rules of procedure, . . . and ethically invalid rules ' (p. 42). His definition only covers rules conforming to ethical principles. But granted that we can establish the existence of rules it still remains to ask how we can establish the existence of this conformity. Professor Hall argues that objectively valid ethical principles are known by intuition and, generally speaking, are to be found incorporated in the American Bill of Rights (p. 20). Thus, in his opinion, there is little practical difficulty in establishing the existence of conforming rules, which will then constitute positive ' law '.

It is clear that Professor Hall cannot expect general agreement that he has established a test of the existence of law which is

capable of precise and objective verification. It is suggested that his concept has more value as an ideal than as the basic notion of legal science. It may even express a valuable insight into the nature of positive law, or of a type of positive law, once this has been previously and more objectively defined. But the need of such definition remains.

It is suggested that Professor Hall has allowed himself to be unduly diverted from his third main insight, which is the desirability of framing a definition of law in terms of a coalescence of form, fact and value. It is generally agreed that law is expressed in rules which share a common form. But definitions have seldom escaped from the following dilemma. When these rules are defined with regard to their value content the product is 'natural law' theories, while disregard of value content leads to positivist definitions of law in terms of sheer power. The latter may suffice for the purposes of the practising barrister. For political purposes, however, it is necessary to have a concept of law as something worth preserving. Is it possible to frame a definition which will serve both purposes,—and satisfy the third insight of Professor Hall?

In the course of a learned survey of a vast field of literature Professor Hall throws out a number of suggestions which lead to a solution of the type he is seeking. Only one can here be mentioned. Facts, he notes, become legal facts only when viewed in relation to a distinctive structure of thought (p. 122). Would he agree that facts may become legal facts *by being involved* in a distinctive structure of thought,—*e.g.*, in a structure of thought relating facts to a distinctive central point in experience? Such a distinctive structure of thought was suggested by Holmes when he defined law as the prophecies of what the courts would do. It is a type of thought which sees possible or actual facts in relation to the probable reactions of courts, and expresses itself in the form of prophecies or hypothetical judgments which may be designated 'rules of law'. These rules of law are not normative judgments. They are objectively verifiable judgments. They express law as fact. Or more accurately they express law in terms of possibility and consequent probability. As the prophecies are verified the rules of law they state are realised in fact.

But this realism does not involve defining law in terms of sheer power. Law so defined can only exist when there are courts whose decisions are in fact reasonably predictable. And such a state of affairs is inconsistent with the sway of an arbitrary and capricious despot. It requires at least the existence of independent tribunals following regular procedures, and regularly referring to certain sources of decision. Whatever we may think of the ethical validity of the norms formulated by these sources there can be no doubt that such a state of affairs incorporates the high grade social values of order and stability and constitutes a system well worth

preserving. Law, defined as such a system, is a coalescence of form, fact and value.

The reviewer would like to add that in developing the line of thought sketched above he derived much help from Professor Hall's stimulating article on 'Integrative Jurisprudence' which appeared in *Interpretations of Modern Legal Philosophies*, 1947. It is submitted that on the basis of the definition of law suggested Professor Hall's insight into the 'nature of law' may well be true of the necessary general conditions of the long-term survival of legal systems. The criticisms suggested in this review are therefore methodological rather than substantial.

B. E. King.

The Office and Duties of the Director of Public Prosecutions. By Sir Theobald Mathew, K.B.E., M.C., Director of Public Prosecutions. [University of London: The Athlone Press. 16 pp. 1s. 6d. net.]

The Court of Appeal in England. By the Right Hon. Sir Raymond Evershed, Master of the Rolls. [University of London: The Athlone Press. 32 pp. 2s. 6d. net.]

These two lectures were delivered before the University of London in 1950. The first makes it clear that we are not on the way to become a police State. The office of Director was created by statute in 1879, but the main developments in the department have taken place within the last forty years. The title is a misnomer, and has led to misunderstanding both at home and abroad, for the Director does not take more than a small percentage of the total prosecutions. Unlike most foreign countries, criminal prosecutions here are not public prosecutions 'in the ordinary sense'. The Director and the police are, in effect, private citizens paid by their fellow citizens to enforce law and order on behalf of private citizens. He is not immune from an action for malicious prosecution when undertaking prosecutions in cases of great importance or difficulty. He acts under the general superintendence of the Attorney-General; a great deal of his work is advisory, and the importance of his office is rapidly increasing.

The second lecture deals with the history, the present functions and the problems that affect the future of the Court of Appeal. The nine members of the court sit from day to day in three divisions and may sit in four divisions when judges can be found to man them. The pressure of work is such that they are unable to reserve as many judgments as they would like. We now have it on good authority that it is 'far easier to be long-winded than short' in an extempore judgment, and that the Rent Acts and taxing legislation invite 'the almost boundless resources of human

ingenuity to find means of evading (avoiding is the politer word) Parliamentary intention'. There is a valuable discussion on the binding force of precedent, and the meaning of the phrase 'every appeal is a rehearing' is made clear at pp. 16–20. Among other problems discussed and to which solutions are offered are,—Should the three present appellate courts be amalgamated to perform different functions at different levels? Should the Court of Appeal be 'leap-frogged' in cases normally destined for the House of Lords? Should certain appeals be financed from public funds?

Both lectures are learned and stimulating and should be read by all who have any interest in the law.

T. E. L.

Appeals to the Privy Council from the American Plantations. By Joseph Henry Smith, with an introductory essay by Julius Goebel, Jr. [Columbia University Press (London: Geoffrey Cumberlege). 1950. lxi and 770 pp. £3 3s. net.]

It is the duty of the reviewer to say at the beginning that this is an important book and of very much wider interest, particularly on this side of the Atlantic, than its title may suggest. The study of legal history already owes much to the Columbia Law School's foundation for research in that subject, most notably in Professor Goebel's *Felony and Misdemeanour* and *Law Enforcement in Colonial New York*, and the present volume will add to that debt.

Particular attention must first be drawn to Professor Goebel's valuable introductory essay, of which the scope can best be indicated by its title, 'The Matrix of Empire', and the keynote by his reference (at p. lix) to 'the unhappy partition of history into ages, eras, and periods, a division invented as a convenience, but which has so worked upon historians that one who holds a warrant for the colonial period will not serve it on some fugitive fact in the precincts of the Middle Ages'. The study of imperial relationships must begin, not in the seventeenth century, but with the great complex of lordships of the English kings in the medieval period, 'a feudal empire, composed of divers honors of which England was but one' (p. xv). This empire dwindled almost to nothing, but its administration was responsible for an accumulation of doctrine which remained. Modern writers have made much of the continuity of English and American developments in the realm of municipal law and institutions, but 'when the subject of imperial relations with the New World establishments came under scientific scrutiny, it was handled as if it had been as much *res integra* to Stuart administrators as it was to modern scholars themselves' (p. xiv). It had not been so. There were direct links between the Stuart administrators and their medieval predecessors, notably in the

government of Ireland. Further, much medieval learning was made available, particularly in Coke's report of *Calvin's Case*, 'which brought to the doorsteps of Stuart administrators the muniments of the medieval empire. . . . The judgment here was a landmark in the settlement of the constitutional relations of England and Scotland; from the manner of its grounding, it was destined also to fix the constitutional status of the new plantations' (p. lx). Particular points of great interest made by Professor Goebel include the observation that while the office of governor might be new in name, 'under such aliases as seneschal, king's lieutenant, warden, or lord deputy, the Chancery had been familiar with it for centuries' (p. xvii); and his indication of the importance of a common analogy to the King's oversea dominions, namely the ancient demesne.

Professor Goebel's essay will also be of great interest to the historian of purely domestic medieval law. In particular, it contains the most extensive account yet printed of the early development of appellate processes in England.

The author's first three chapters are an account of the development and settlement of the council's jurisdiction from the beginnings until the American revolution. He has not confined himself to appeals from the American possessions: the first forty pages are devoted to the development up to the Restoration of appellate jurisdiction from the Channel Islands, a topic interesting in itself and important as foundation for the achievement of his main purpose; and throughout there is substantial discussion of the Channel Islands and the insular colonies of the Caribbean. The whole of this part of the book constitutes a passage of note in the history of government, and this is particularly true of developments in the earlier colonial period when local administration of justice was commonly regulated by private bodies, the patentees. It is perhaps not surprising that the earliest patents did not expressly reserve a right of appeal to the King, but that this omission should have continued so long in face of the trouble which it caused seems to require more explanation than it has had.

The fourth, fifth, and sixth chapters are concerned respectively with the regulation of appeals, particularly the matter of minimum sums in issue, the taking of security, etc.; with council procedure, a most interesting topic; and with the limitations accepted by the council on their powers of action in particular kinds of case. The seventh chapter deals with appeals from royal commissions. In relation to the law, as opposed to its administration, probably the most interesting part of the book is the eighth and ninth chapters. The former is largely concerned with the application of Acts of Parliament to the overseas possessions: the latter with the complementary proceeding, the avoidance of colonial legislation, previous discussions of which, as the author observes, have tended to oversimplify the problem.

The author concludes with a critical estimate of the value of the council's jurisdiction, and any one who reads his book is bound to agree with him that this was not so great as it might have been. The assets of detachment and prestige were discounted by a persistent refusal to take advantage of opportunities. Within the limits which it established for itself, the council appears to have done its job competently; but these limits were too narrow for the job which it ought to have done, and were deduced from considerations which were partly irrelevant.

A criticism which may be made of the book is that it tends to be diffuse, but this is perhaps to some extent inevitable if accuracy is to be maintained in treating of a subject-matter inherently immune from classification. Some of the less important details might, however, have been removed from the text. A minor irritant is the sporadic occurrence of rich veins of polysyllables. One misprint is noted because it is funny: at p. 467 *Calvin's Case* is said to have been 'argued by all the great mastiffs of the law'. But the book has been carefully and excellently produced, and is a substantial contribution to legal history.

S. F. C. M.

South Carolina Chancery Court Records, 1671–1779. Edited by Anne King Gregorie, with an introduction by J. Nelson Frierson. [Washington, D.C.: The American Historical Association. 1950. 676 pp. $10.00 net.]

This volume, which has been prepared under the auspices of the Committee on the Littleton-Griswold Fund, will of course be of most value to those who are concerned with the social and legal history of South Carolina during the colonial period; and to these it must be indispensable. But it deserves the attention of a wider public. The transplantation of English law to lands where the conditions of life were very different, and where lawyers might be few and law books frequently scarce, is a phenomenon which ought to engage the interest of English as well as of American legal historians. This books shows very clearly how formidable the difficulties could be.

Apart from an abortive attempt in 1720 to establish a chancellor, the work of the chancery court throughout the period, both under the proprietors and under the royal government, was performed by the governor and council (or after 1721 the governor and a majority of the council); and whether many of these gentlemen had any legal training was a matter of chance. The records printed fall into three groups. First there are extracts from the Journal of the council between 1671 and 1692, some of which show the council resolving itself into a court of chancery and resolving itself back again into the council. Secondly there are some case papers, often only the

bills of complaint but sometimes interrogatories, etc., between 1700 and 1720. And thirdly there are the minutes of the court under the royal government from 1721 to 1779. Of these the first and smallest group is in a way the most interesting, because until 1698 there were no lawyers practising in Carolina at all. This circumstance is no doubt partly explained by the most remarkable provision in the remarkable—and largely impracticable—constitution believed to have been drafted for the proprietors in 1669 by their secretary, John Locke : ' It shall be a base and vile thing to plead for money or reward; nor shall any one (except he be a near kinsman nor farther off than cousin german to the party concerned) be permitted to plead another man's cause, till before the Judge, in open Court, he hath taken an oath that he doth not plead for money or reward . . .'. Readers incensed by this slur may draw comfort from the reflection that Locke was probably put up to it by Shaftesbury, who was one of the proprietors; and if Roger North is to be believed, the Chancery bar conspired to give Shaftesbury a terrible time when he became Chancellor.

Since these documents are records and not reports, their interpretation in terms of legal history will require considerable astuteness; but the task should be possible, and it will be very interesting to learn to what extent the development in Carolina was parallel with that in England. The value of the book for this purpose, and also as material for the social historian, will be much enhanced by the introductory information and the annotations of the editor, and by the learned Legal Introduction by Dean Frierson.

S. F. C. M.

International Law. The Collected Papers of Sir Cecil J. B. Hurst. [London : Stevens & Sons, Ltd. 1950. ix and 302 pp. 30s.]

A STORY is told as to how a crowd once recognised the octogenarian Gladstone and demanded to ' hear that grand old voice again ', refusing to be satisfied until the statesman responded with the ringing cry of ' Electors '. This volume, which was prepared, appropriately enough as a result of suggestions from Cambridge, in order to commemorate the eightieth birthday of Sir Cecil Hurst, enables us, as it were, to hear again such another voice. For here are reprinted the papers which Sir Cecil contributed to the *British Year Book of International Law*, of which he was the originator and first editor :—' The Effect of War on Treaties '; ' The Territoriality of Bays '; ' Whose is the Bed of the Sea? '; ' State Succession in Matters of Tort '; ' Wanted! An International Court of Pie Powder '; ' Nationality of Claims '; ' Diplomatic Immunities—Modern Developments '. Here, too, is his Hague course on diplomatic immunities. And here also are his highly influential addresses to the Grotius Society, of which he was

President, entitled 'A Plea for the Codification of International Law on New Lines' and 'The Continental Shelf'.

The reviewer of this collection is not called upon to presume to offer any assessment of its contents, for every item is already more than familiar. Nor, since in the latest *Year Book* Sir Eric Beckett has surveyed this with inimitable grace and authority, need he say anything of Sir Cecil's long and illustrious career. It remains, therefore, but respectfully to wish Sir Cecil many happy years still to come, and to record that students of international law owe a debt to Professor Lauterpacht, who succeeded Sir Cecil as editor of the *Year Book*, for having initiated and supervised the publication of this volume. It is an entirely worthy tribute to a great international lawyer. For he wrote every word of it himself! One is only sorry that there is omitted—though of course for obvious reasons—that great landmark in the law, the celebrated 'Revision of Mr. Hurst' [of the draft text of the Covenant of the League of Nations].

Clive Parry.

The American Mind. An Interpretation of American Thought and Character since the 1880's. By Henry Steele Commager. [London: Geoffrey Cumberlege (Oxford University Press). 1950. 475 pp. 30s.]

No attempt can be made in this notice to review, in any way commensurate with the importance and the scholarship of the book, a lively and graceful contribution of one of the leading historians in the United States. Professor Commager has been long admired for his combination of the high competence of a historian with a manner of exposition which has made us think of his writings as polished pieces of literature. The present book confirms that judgment. It is sufficient to mention some of the chapters as indicating the range of the book. They include a suggestive exposition of what the author calls the 'watershed of the nineties' and the transition years in literature and journalism. The chapters on William James and the Impact of Pragmatism, on Determinism in Literature, on the Cult of the Irrational, on the Traditionalist and on Religious Thought and Practice are preceded by a refreshing exposition of the much neglected John Fiske and his influence on evolutionary philosophy. There follow interesting chapters on Lester Ward and the Science of Society; Thorstein Veblen and the New Economics; the Literature of Revolt; the Transition in Historical Literature; and the Innovators in Historical Interpretation such as Parrington and Beard.

Of more direct interest for the lawyer are the chapters on the trend towards a new science of politics and the application of political theory. In the present review special reference must be made to the author's exposition of the evolution of American law,

and of the masters of the new American jurisprudence: Pound and Holmes. Professor Commager's admiration for the great judge and lawyer is unstinted and unbounded. It is possible that the picture would have gained in persuasive force if the author had drawn attention to some aspects of Mr. Justice Holmes's philosophy which have been exposed to criticism, such as his attitude to the doctrine of State immunity. His somewhat impatient affirmation that the State as the author of the law can do no legal wrong has exposed him to irreverent comparisons with Hobbes and Hitler and, not unnaturally, has tended to create the impression that in his view the State is the exclusive author of the law administered by courts. It is also possible that Professor Commager's exposition of the place of natural law in American law may be regarded by some as treading too faithfully the path followed occasionally by Holmes. The 'higher law' has not been invariably the tool of reaction. However, these are debatable questions. So are some of Professor Commager's — probably unintentional—comparisons, for instance, when he says that 'no British or Continental university gives the training in law that a score of American universities provide as a matter of course' (p. 364), and that 'no one familiar with the *Harvard Law Review* and the *Yale Law Journal* can doubt that in those fields of legal scholarship which are not antiquarian America is pre-eminent' (*ibid.*). It might be interesting to have the benefit of the comment, on the latter passage, of the editors of the *Law Quarterly Review* or of the *Modern Law Review*. The learned author quotes elsewhere (on p. 439) the following passage written in 1847 by Emerson on England: 'If there is one test of national genius universally accepted, it is success'. This applies to the United States of today clearly and overwhelmingly—so overwhelmingly, indeed, that any comparison with others, however accurate, is likely to derogate from the cogency of the statement.

H. L.

American Administrative Law. By BERNARD SCHWARTZ, LL.M. (Harvard), PH.D.(Cambridge), Assistant Professor of Law, New York University. [London: Sir Isaac Pitman & Sons, Ltd. 1950. xv and 144 pp. 25s.]

THIS book is designed to explain to English readers the main features of American administrative law. To the author, as to many lawyers, administrative law means delegated legislation and administrative adjudication and particularly the extent to which the law courts can control those activities. This means that Dr. Schwartz is dealing primarily with the controversial parts of what is really a much larger subject, and when a man writes on controversial matters it is as well to see what assumptions he

makes. On the last page of the text he says: 'It has, however, become a commonplace that free government in this country [Great Britain] is in greater peril than it has been for centuries, and this because of the tremendous expansion of executive power'. That is highly controversial, and its truth is not established by saying that it is a commonplace any more than its falsity would be shown by calling it claptrap. The difficulty is not that Dr. Schwartz is not fair to both sides of an argument; it is that he sometimes just does not see that there is another side. Close your eyes to all this, run in legal blinkers, and believe that there are no other interpretations, and there is a rich reward in reading this book. There is a general inclination in England to assume that American institutions can have little bearing on our practice because of the fundamental difference in the position of the judiciary and the legislature in the two countries. There is a further difference in the administrative field in that the regulatory commission is not one of our principal forms of control, though some of our official inquiries have shown us the difficulty of a single body being investigator, prosecutor and judge. Public hearings before regulations are made and the development of a separate corps of hearing officers for administrative justice, are perhaps the two things about which least is known in England, although it may be said that the outstanding thing is not any particular institution but the whole conception of the regulation of administrative processes by a general statute. The text of this, the Administrative Procedure Act, 1946, is given as an appendix. Among lesser points is the attitude of the courts towards administrative interpretation of legislation. 'In America, indeed, they tend to acquire all but statutory effect because of the great deference which the courts normally pay to them, where the governing legislation is not wholly clear' (p. 35). In *Re Robb's Contract* [1941] Ch. 463, it was sought to use an Inland Revenue interpretation of a section of the Finance Act, 1910, contained in a departmental circular, but the Court of Appeal would not allow even 'the existence of that circular to affect its mind in deciding what is the true construction of the section'. There would seem merits in a midway position, which is an observation that is perhaps applicable to other matters.

R. M. J.

Government by Decree. A Comparative Study of the History of the Ordinance in English and French Law. By Marguerite A. Sieghart, ll.b., dr.jur. [London: Stevens & Sons, Ltd. 1950. xxix and 319 and (index) 25 pp. 30s. net.]

This book is primarily concerned with the history of legislation by the Executive in the two countries. But it will be welcomed by the English student of public law because of the account which is

given (in English) of the *contentieux administratif*. This account is based on Hauriou's well-known textbook; if it suffers somewhat from a too literal transcription, that at all events helps to show how wide are the different approaches to the subject. The book also contains a short account of the various written constitutions of France, a matter with which few English lawyers will be familiar.

French administrative law is more independent of the legislature than is that of the United Kingdom; equally it is separated from control by the ordinary courts. Consequently France has experimented successfully with a system of administrative jurisdiction, at the head of which stands the *Conseil d'État*. With us the courts have never ceased, despite some self-immolation on the part of the higher courts of late years, to control breaches of law by administrative agencies. Now that a remedy is usually available against the central government, as it always has been against its officer, the jurisdiction of the High Court has been strengthened. But it is mainly in the overriding jurisdiction by orders which have replaced the remedy by prerogative writ that the High Court exercises its supervision of administration. The exceptions which exclude jurisdiction in cases where judicial review is appropriate are too few to justify so drastic an innovation here as a special administrative appeal court. It is, however, to the advocates of such a proposal that parts of this book make a strong appeal. Mrs. Sieghart is to be congratulated on the whole book and in particular on that part which gives the English reader a survey of the principles of French administrative law. That she may have failed to convince some of their applicability here is no discredit to her, particularly as she has won over so redoubtable an exponent of judicial supremacy as Dr. C. K. Allen, whose foreword is notable for containing his declaration of conversion to the idea of an appellate administrative tribunal. Will not somebody now suggest its composition and functions? A draft Bill would be stimulating.

E. C. S. W.

Outlines of Muhammadan Law. By Asaf A. A. Fyzee. [India: Oxford University Press. 1949. xvi and 443 pp. 25s.]

Mr. Fyzee has made a notable contribution to the study of Muhammadan law as administered in India; and while it is the university student with whose needs he has primarily concerned himself—and by whom this book will be chiefly welcomed—it will be appreciated by all who have occasion to consult it. Not least among a number of excellences is the purity and lucidity of its English, and we can well believe the author when he assures us that 'not a paragraph has escaped unremitting attention and careful pruning'. In addition, the transliterations from the Arabic are, with few exceptions, both consistent and accurate.

In an opening chapter of some forty pages Mr. Fyzee gives

an admirably balanced introduction to his subject, and one which represents a distinct advance on that provided by any of the standard textbooks usually consulted by university students. Almost inevitably, however, such a summary includes a number of statements of doubtful accuracy: and it is regrettable that the learned author did not have the opportunity to consult a later production of the Oxford University Press, *The Origins of Muhammadan Jurisprudence*, by Joseph Schacht.

The next chapter, on 'Application and interpretation', is particularly valuable, since it includes the consideration of comparatively recent legislation. But Mr. Fyzee is guarded to the point of understatement when he remarks (at p. 67) that it is 'impossible to deny that occasionally differences of opinion among the (ancient) authorities are to be found', and when he regards it as an 'unwarrantable assumption' that these texts are sometimes 'confused, inconsistent or inaccurately expressed'.

Chapters on Marriage, Dower, Dissolution of Marriage, Parentage and Legitimacy, Guardianship, Maintenance, Gifts, Wakf, Pre-emption, Wills and Gifts made in Death Sickness, Administration of Estates, the Sunnite Law of Inheritance and the Shiite Law of Inheritance follow. Each is characterised by a determined and successful effort not to lose sight of the wood for the trees, although they include occasional lapses and there are places where rather more discussion of difficult or questionable points would have been welcome. But this is, in part, compensated for by continual and copious references in footnotes to all the standard textbooks. An additional merit is that the learned author has covered developments in the law up till March, 1947—prior to the partition of India into two self-governing Dominions—while he has completed case references, in so far as reports were available, down to the end of 1946, together with a few later references added in course of printing.

The book ends with useful Appendices (including a select bibliography), and Indexes. It is excellently produced and unusually easy to read.

Constitutional Law. By E. C. S. WADE, M.A., LL.D., of the Inner Temple, Barrister-at-Law, Downing Professor of the Laws of England in the University of Cambridge, Fellow of Gonville and Caius College and G. GODFREY PHILLIPS, C.B.E., M.A., LL.M., Solicitor of the Supreme Court, sometime scholar of Trinity College, Cambridge. Fourth edition. By E. C. S. WADE. [London: Longmans Green & Co. 1950. xxix and 508 and (index) 28 pp. 35s. net.]

ALL concerned with constitutional matters will have been aware of the rapid developments in this field of the law in the last few years.

The Crown Proceedings Act, 1947, has been passed to fill 'a lacuna in the rule of law' thereby invading the ancient principle that 'the King can do no wrong'. Many new public utility boards have been established. The courts, in such cases as *Franklin* v. *The Minister of Town and Country Planning* (1948) A.C. 87, are facing fresh problems in respect of exercise of discretionary powers. Administrative tribunals have multiplied. Some have special arrangements for an appeal. Others, such as the rent tribunals, do not, and the order for certiorari is being widely exercised in their control. In the Commonwealth there have been momentous changes. Pakistan and Ceylon have acquired equality with the other member States. Eire and Burma have seceded, while India stays in as a sovereign independent republic.

These are a few of the changes that have made imperative a new edition of *Wade and Phillips*, and we are particularly glad to see that the latest edition comes from the hand of Professor Wade himself. This not only serves to retain the authority of the text-book but also to ensure that all recent developments are assimilated with adroitness and accuracy.

Of particular interest is the new chapter on Cabinet organization (Part IV, Chapter IV) with some illuminating facts on Cabinet committees and the Cabinet secretariat. There is a balanced account of the merits and demerits of the administrative tribunal as an instrument of justice (pp. 318–9). The claim made for the administrative tribunal is that it is particularly appropriate where the question to be decided is a matter of policy as well as the application of principle. But surely it can be said that the judiciary are as much imbued with the trends of the age as any anonymous ministerial board. The county courts, in considering whether it is 'reasonable' to order possession of dwelling-houses under the Rent Acts, have to adopt a social outlook in no way distinguishable from a rent tribunal that has to fix a 'reasonable' rent.

The chapters on the Commonwealth (in Part X) are a lucid exposition of a difficult subject involving law, custom, convention and practice.

This book has grown enormously since its first edition in 1931. Since the third edition in 1946 some fifty pages have been added together with references to twenty-five recent cases and sixty-seven new statutes. The criticism of this book, if it be a criticism, is that it contains too much. The result is a conciseness and an economy of language that can only be properly appreciated by considerable outside reading. We do not ask that the book should be any longer, or that it should suffer in completeness by the abandonment of any topic. It is, however, suggested that some details (*e.g.*, ministerial salaries at pp. 139–40) might be pruned in favour of greater elucidation of principle. Professor Wade, with characteristic modesty, is always ready to quote the opinions of

others. There will be many who feel that for some of them the learned editor might well substitute his own.

The format of the book is the same as before, and shows that a legal textbook can be well produced by a general publisher. One might wish however that the solid text could have been broken up with cross-headings in place of the marginal notes, and time would be saved by cross-references to pages always instead of sometimes to parts and chapters.

This new edition will no doubt achieve, as it deserves, the success of the earlier editions and can only serve to enhance the reputation of *Wade and Phillips* as a textbook of pre-eminence in constitutional law.

DENNIS THOMPSON.

Ridges' Constitutional Law. Eighth edition. By G. A. FORREST, M.A.(oxon) of Gray's Inn, Barrister-at-Law; Lecturer in Law, University of Bristol. [London: Stevens & Sons, Ltd. 1950. xxviii and 518 and (index) 33 pp. £2 2s. net.]

To bring a textbook on constitutional law up to date since the last edition in 1939 is a Herculean task and no one will doubt the enterprise and industry of Mr. Forrest in making the attempt. In producing a new edition of *Ridges* he has done a great service to the student community and indeed to the whole legal profession (for they never cease to be students).

It is however idle to pretend that the result is entirely satisfactory. The glossy sleekness of its pages reveal (after a long time in the press) an inordinate number of misprints and tiresome errors such as (on p. 297) the 'substantial rule' that the King can do no wrong. The old chapters have not always been accurately brought up to date. There are references (at p. 320) to the power of magistrates to award sentences of 'hard labour', but none to their power to commit for sentence to quarter sessions. An irritating feature is the tendency to refer to statutes in regnal years and chapters. Thus a footnote on p. 322 to a statement of highly dubious accuracy even before 1948 relative to the right of appeal from petty to quarter sessions cites '23 & 24 Geo. 5, c. 38, s. 19'. In fact c. 38 has only 11 sections and it appears to be a confusion for 42 & 43 Vict. c. 49, s. 19 which has in any event been superseded by 11 & 12 Geo. 6, c. 58, s. 36 (The Criminal Justice Act, 1948).

In dealing with the proposals to abolish the appellate jurisdiction of the House of Lords there appears the statement (at p. 314) 'Unfortunately, on a change of Government, the House of Lords repented of its consent'. This is a bold view not universally held and which, unqualified as it is, tends to mislead.

Even the new matter is not always sound. There is a remarkable sentence referring to the Court of Criminal Appeal at p. 312:

> 'The Criminal Justice Act, 1948, gave the court power to order a new trial where the first trial was vitiated for technical reasons and justice demanded a pre-hearing'.

There is no footnote here referring to any section. Indeed there is no such section in the Act.

The chapter dealing with quasi-judicial powers is scarcely lucid and when it is said (p. 261) that it is not always easy 'to disentangle administrative and judicial functions' the only doubt is whether the first victim of the entanglement has not been the learned editor.

The historical and descriptive sections of this book are excellent. But it must be maintained that unless a textbook grapples faithfully with the legal principles and states the law with precision, it becomes 'The Constitution without tears' instead of 'Constitutional Law'. It is not desired to decry what Mr. Forrest has achieved, but it is to be hoped that he will not rest until he has brought this book up to the high standard that modern legal scholarship requires.

D. C. T.

Emmet's Notes on Perusing Title and on Practical Conveyancing. Thirteenth edition. By J. Gilchrist Smith, ll.m. Solicitor (Honours) Vol. 2. [London: The Solicitors' Law Stationery Society, Ltd. 1950. cxxviii and 670 and (index) 78 pp. £6 10s. for the two volumes.]

The second volume of *Emmet* contains much more obvious signs of Mr. Smith's changes than did the first. In fact it contains a series of chapters most of which might be expected in a straightforward treatise on conveyancing, such as Gibson's *Conveyancing*. The reason for the order in which the chapters appear is not apparent, since the volume opens with a chapter on the custody of title deeds, which might be expected in Vol. I, continues with a chapter on Settled Land, which deals only with the settlement and disposition of the legal estate, passes to Leases, Agricultural Holdings, and Mortgages and then turns to Town and Country Planning and Compulsory Acquisition, after which it deals with Wills, including many topics appropriate to Settlements also, Intestacy and Personal Representatives, after which it reverts to Trust and Trustees and this includes both trusts for sale and something about settlements of personalty, and so on to Powers of Appointment, Death Duties, and Copyholds, winding up with a chapter of 40 pp. on Registered Land. No doubt the odd order

is partly a legacy from the previous edition where the learned author had based his book originally on the order in which clauses would appear in a deed. It is suggested that the value of the reorganisation would be enhanced, if it were carried a little further.

The essentially new material appears to be in the chapters on Agricultural Holdings, Town and Country Planning, Compulsory Acquisition, and Registered Land. The learned editor in his preface to this volume remarks: 'Other chapters in this volume break new ground, but the information contained in them would appear to be essential in conveyancing practice at the present time'. He then proceeds to discuss the treatment of these chapters. We are not certain that we would necessarily take the test that he offers or, if we did, whether we would feel that all matters falling within the test had been included, particularly as very little is said, for instance, of that extremely technical branch of conveyancing, dispositions of reversionary interests. But it is hopeless to attempt within two volumes to cover all the matters that are essential to the conveyancer.

The essential problem that faced the learned editor in this volume he discusses in connection with Registered Land, but what he says there really applies to the volume as a whole. It is the problem of delimiting the contents, and in our view the weakest part of this work as a treatise lies in this. Obviously much must be left out unless the volumes are to be larger or more numerous, but in Registered Land the dilemma is particularly noticeable. It may be very flattering to the esteem of this reviewer to find the frequent references to his work in 3 K. & E. (though in some cases the 2nd ed. of the *Principles of Registered Land* would be a better expression of his present views), but surely it is on the whole desirable to be informative rather than comprehensive. Forty pages are insufficient to deal with the law and practice even of the more common form transactions of registered conveyancing, but if the book can only allow to this topic forty pages then, for instance, settled land should have been omitted altogether. Likewise, assuming that powers of appointment should be included then the jejune treatment of such matters as fraud on powers, and powers in the nature of a trust could well be left to the student's books and more space devoted to the practical effect of exercise. What we could not find, for example, was how effect should be given to the exercise of a power under a settlement when the object obtained a fee simple absolute in possession and wanted to obtain a legal estate. Similarly, the learned editor says (at p. 1208): 'There are three kinds of powers of appointment: a general power, a special power, and a power to appoint with certain exceptions'. With respect we suggest that this fails to do justice to the third class of power, which on the authorities may be a power subject to exclusion: *Re Park* [1932] 1 Ch. 580; or may be a power which is too general to be a special power,

but is not wide enough to be treated as a general power, though it is not expressed in terms of exceptions: *Re Jones* [1945] Ch. 105. It is suggested with great diffidence that as the rules governing this third class of power, as it was called in *Re Park* (*supra*), are worked out they may not always prove to be the same for both cases.

The same problem of space is noticed in Settlements. There the chapter so headed really deals with the settlement of the legal estate, which is very much a problem of vendor and purchaser, and other relevant topics, so far as they are dealt with at all, appear elsewhere. But a treatise on conveyancing needs to deal with trust instruments as a whole. When to the technicality of settled interests is added the complications arising from the incidents of taxation, a problem constantly perplexing the practitioner, the subject claims the most integrated treatment. Indeed, in our view the chapter on Death Duties is inadequate and would better have been omitted, because this subject is so complex that a little learning is apt to be a very dangerous thing.

For these reasons we think that the learned editor would have been well advised to omit the general subjects of Town Planning and Compulsory Acquisition in order to devote more space to the other topics that he has included. Both subjects are the topic of massive works and commonly involve such complication of detail that a general summary may carry the practitioner little further.

It is now important to say that the criticisms contained in this review are not to be taken to imply that Mr. Smith has not done a very good piece of work. We think that practitioners will find this volume very helpful in innumerable matters that arise in the course of conveyancing practice. It is a first book that does not replace existing works, but should prove a very convenient work to have on the shelves.

H. P.

Underhill's Law relating to Trusts and Trustees. Tenth Edition. By C. Montgomery White, of Lincoln's Inn, one of His Majesty's Counsel, and M. M. Wells, of Gray's Inn, Barrister-at-Law. [London: Butterworth & Co. (Publishers) Ltd. 1950. cxlvii and 593 and (index) 57 pp. 75s. net (by post 1s. 6d. extra).]

Sir Arthur Underhill, in his preface to the eighth edition (1926) of this book—the last edition which was prepared by him alone—described his desires in the writing of it. He had desired it to be ' a book of a really practical, but concise, character '. He insisted, moreover, that the doctrines of equity ' are progressive, refined

and improved; and [citing Jessel M.R.] *if we want to know what the rules of Equity are, we must look rather to the modern* than to the ancient cases'. The learned editors of the present edition, no doubt, have felt impelled to follow these ideals. A somewhat cursory examination of it suggests accordingly that their chief endeavours—undoubtedly successful—have been to bring the previous edition up to date in the light of modern cases but otherwise to adhere rather strictly to Sir Arthur's text and mode of treatment.

There is much to be said for this method of editing a classic textbook. To mere academic lawyers, however, it leaves something to be desired. Indeed, for those of us who still prescribe it for graduate study, there is some reason for disappointment. The criticisms offered, in this Journal (7 C.L.J. 286) and in the *Law Quarterly Review* (56 L.Q.R. 420) in reviews of the ninth edition, seem to be equally applicable—with appropriate modifications of the page references—to this, the tenth, edition. In particular, secret trusts and mutual wills are still left without adequate explanation; the index does not always enable one to find the topic which one is seeking (*e.g.*, mutual wills are indexed only for p. 56, n. 5, charitable trusts only for p. 25, and non-charitable purpose trusts, it would seem, are indexed only under the respective rubrics 'Illegality, trusts void for: 69, 70' and 'Trust, unenforceable but not void: 70'—but see further pp. 73, 94–97). Moreover, it would appear that the earlier tendency to ignore entirely any relevant leading articles in the various journals persists.

To most of these comments, however, the learned authors would presumably answer, and with some justice, 'We are maintaining the policy which Sir Arthur Underhill adopted for this particular book'. And this same answer, no doubt, would justify such pleasant anomalies as the inclusion of incompletely constituted trusts (not indexed *semble*) under the head 'Executory Trusts'—see pp. 12, 17, 150 *et seq.* Among minor comments of a somewhat different character, one might refer also to page 26 (the facts ascribed to *Re Park*); the peculiar wording of the fourth proposition on page 70 ('A trust to perform certain acts which are of no benefit to any human being is not enforceable unless it is a charitable trust'); and it would seem that the references (pp. 353 *n*, 564) to Articles 99 and 54 refer in fact to Articles 98 and 53 respectively. Moreover, the customary exposition of 'wilful default' (at pp. 351–353), as though *Re Vickery*, founded on decisions as to the words 'wilful neglect or default' in the articles of association of companies, is the only authority, does not perhaps go deeply enough: if the suspicion (see, *e.g.*, Astbury J., in *Re Munton* [1927] 1 Ch., 274) that the statutory phrase was merely declaratory is indeed correct, the earlier and perhaps more direct authorities as to its meaning would seem to merit consideration—see, *e.g.*, Lindley L.J., in *Re Chapman* [1896] 2 Ch. 763, 776.

These random samplings, of course, are hardly fair to a book of this bulk and quality. In many respects the book is both admirable and enlightening. Indeed, the abiding impression is that one is glad, and indeed relieved, to be able to place at one's elbow, once again, a modernised edition, handsomely produced, of this stimulating and often satisfying textbook.

S. J. B.

Stephen's Digest of the Criminal Law. Ninth edition. By Lewis Frederick Sturge, of the Inner and Middle Temples and the Midland Circuit, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1950. xlvii and 580 pp. £2 5s.]

The last edition of *Stephen's Digest* was in 1947, and the editor has had as his principal care the incorporation of the changes made by the Criminal Justice Act, 1948. He has slipped, in Article 45, in assuming that Broadmoor patients go to Broadmoor Institution (I have tried to clarify some of these matters elsewhere in this Journal), but otherwise the recasting of Chapter V gives the new law. It is doubtful whether *Stephen's Digest* can be a really satisfactory book as long as the editorial policy is to ignore articles in legal journals. The student in search of enlightenment on attempts, or puzzled by manslaughter and dangerous driving, will get no help from this edition. *Bateman* (1925) 19 Cr.App.R. 8 is not cited, although it is a direction that has been used over and over again. There are matters of frequent occurrence in the courts that do not appear at all. Offences under Road Traffic Acts appear very briefly in Article 299, but disqualification from holding a driving licence does not appear there nor in Article 58 headed 'Consequences of Conviction'. There is, of course, great difficulty in producing an up to date and usable edition of a famous textbook written over seventy years ago; few people will be satisfied and the luckless editor gets blame where sympathy is really needed. Before there is another edition the publishers should consider the purpose that this book is now intended to serve.

R. M. J.

Stephen's Commentaries on the Laws of England. Twenty-first edition. Editor-in-Chief, L. Crispin Warmington, Solicitor of the Supreme Court. Vol. I. Sources of Law and History of Legal Institutions: by W. H. D. Winder, M.A., LL.M., of Lincoln's Inn, Barrister-at-Law. Law of Property, Parts I–VII: by A. D. Hargreaves, M.A., LL.B., Solicitor of the Supreme Court, Reader in Law in the University of Birmingham. Part VIII (Death Duties): by G. M. Green, LL.B.,

Solicitor of the Supreme Court (xvii and 668 pp.). Volume II. The Law of Contract: by Alan S. Orr, o.b.e., m.a., of the Middle Temple, Barrister-at-Law. The Law of Torts: by H. J. S. Jenkins, b.c.l., m.a., of the Inner Temple, Barrister-at-Law, Director of Legal Studies in the University of South Wales and Monmouth and of Swansea. Natural Persons: by Alan S. Orr. Associations of Persons: by Raymond Walton, b.c.l., m.a., of Lincoln's Inn, Barrister-at-Law. Building Societies: by A. E. Shrimpton, f.b.s. (xiv and 604 pp.). Volume III. Civil Procedure: by R. Sutton, k.c., m.a., Reader in Common Law to the Council of Legal Education; Edward F. Iwi, Solicitor of the Supreme Court; with Chapters 1–8, on the Organisation of the Courts, by W. H. D. Winder. The Legal Profession: by T. G. Lund, c.b.e., Secretary, The Law Society; E. H. V. McDougall, Under-Secretary, The Law Society. Constitutional and Administrative Law: by F. H. Lawson, d.c.l., of Gray's Inn, Barrister-at-Law, Professor of Comparative Law at the University of Oxford; H. J. S. Jenkins; William O. Hart, c.m.g., b.c.l., m.a., of Lincoln's Inn, Barrister-at-Law (xiv and 603 pp.). Volume IV. Criminal Law: by W. H. D. Winder. (xii and 292 and, Table of Cases to Vols. I–IV, 22 and, Index to Vols. I–IV, 145 pp.). Supplement 1950: by L. Crispin Warmington: 19 pp. [London: Butterworth & Co. (Publishers) Ltd. 1950. Four volumes with Supplement. £6 15s.]

The last complete edition was published in 1928, so that the work involved in bringing the present edition up to date to January 1, 1949, has been unduly heavy. *Stephen*, once again, is intended to be a complete elementary statement of English law covering the legal portion of the Intermediate Examination of the Law Society. Many new names appear in the able team of editors; the long practical and teaching experience of Mr. L. Crispin Warmington, the editor-in-chief, is such as to make him admirably qualified to know the needs of students, and to satisfy those needs by a clear and accurate exposition of the law. This edition follows the lines of its predecessor but there has been much reshuffling of the material contained in each volume, *e.g.*, Property which used to be Volume II is now Volume I, the Law of Contract and Torts is in Volume II instead of Volume III, as formerly, and the account of the Courts and Civil Procedure is postponed from Volume I, in which it formerly appeared, to Volume III. Opinions must vary on the order and arrangement of subject-matter, contract appears to be easier to tackle than property. In style it is more like the 1925 edition, a straightforward narrative form, but more statutes and cases are cited than in the 1928 edition. There is but one

table of cases, and one index, both of which appear in Volume IV, and there is no table of statutes. An index and a table of cases in each volume would be an improvement.

Volume I. The first 78 pages deal with the sources of English law and the history of English legal institutions, with an additional chapter on the history of the courts, and a fuller account is given of the growth of equity. The three pages in Volume III, pp. 291–3, on interpretation of statutes, might well have been inserted in Chapters 1 and 2 of the first volume, and *Heydon's Case* added. Some 550 pages are devoted to real and personal property, including transfer of property on death and inter vivos. These pages are entirely re-written and the arrangement entirely different. There is a clear account of the pre-1926 law and of the effect of the 1925 legislation; the whole story from 'feudalism' to 'planning' is extremely well done. At p. 112 anniversary is misspelt and some reference to survivorship at p. 117 might help the beginner. There is a final chapter of 23 pages on death duties.

Volume II. The general principles of the law of contract take 105 pages; they are more brief than in the previous edition and the chapter on the history of contract and tort is omitted. Particular contracts are dealt with in greater detail, and chapters on contracts of service, bailments, loan of money, insurance, guarantee and quasi contract have been added. Perhaps a fuller account of the general principles would be more useful to the student. Though up to date, it might be well to draw illustrations from some of the later decisions, particularly on the measure of damages. The 200 pages on the law of torts are written in an attractive and arresting style and the more modern leading cases are employed. There is a great deal of re-writing here, particularly in the chapter on negligence, where the principle of *Donoghue* v. *Stevenson* and its later development is extremely well explained. Natural persons take up 60 pages and associations of persons 50 pages.

Volume III contains 234 pages on the organisation of the Courts, procedure in the High Court and other courts, a chapter on evidence and one on the legal profession. The chapter on matrimonial causes has been completely re-written. This somewhat dull subject is now dealt with in a lucid and logical sequence, and is well done. Constitutional and administrative law is well surveyed in 336 pages. There are three chapters on local government and one on the Commonwealth and the Empire. There has been much revision here.

Volume IV. The principles of criminal law, evidence and procedure are clearly and attractively presented in 287 pages. The Criminal Justice Act, 1948, and a crop of modern cases have involved many changes, and the maximum statutory terms of imprisonment for various offences are now relegated to an appendix

of six pages. The rest of the volume (167 pages) is a table of cases and an index to the four volumes.

The law is stated as at January 1, 1949, but the 1950 Supplement has already been published and brings it up to January 1, 1950. Further supplements will be issued to keep it up to date. One person could hardly review this work in detail; an attempt has been made to indicate some of the changes from the previous edition. It has been good to renew acquaintance with *Stephen*. The editors are to be congratulated upon producing an admirable modern edition.

T. E. L.

Current Legal Problems 1950. Vol. 3. Edited by G. W. Keeton and Georg Schwarzenberger on behalf of the Faculty of Laws, University College, London. [London: Stevens & Sons, Ltd. 1950. vii and 302 and (index) 3 pp. 21s. net.]

The majority of these addresses deal with the problems of modern English law and are of interest to the practising and the academic lawyer. Lord Normand deals with the waning jurisdiction of the Privy Council in appeals from overseas and its future prospects, and concludes that where the right of appeal has been lost, it is not due to the manner the Judicial Committee has performed its task, but the changed political conception, that a member of the British Commonwealth should not be precluded from setting up its own final court of appeal with ultimate and exclusive jurisdiction. Professor Keeton emphasises the Changing Conception of Trusteeship under the selection of trustees, the contrast between the private and the corporate trustees, and the difficulties concerning trustee investments. Dr. Marshall states that the story of equity is writ large with anachronisms, and his essay does not leave one in doubt. Mr. Lloyd deals with the Changed Relation of Landlord and Tenant, what has happened to the landlord's 'four freedoms', and the new tribunals. Mr. O'Sullivan's Evolution of the Law of Libel is a delightful presentation. Mr. Edwards is concerned with the artificialities and intricacies of the present rules relating to possession in larceny. Mr. Holland deals with the reforms embodied by the Report of the Lewis Courts Martial Committee (1949) and makes three further suggestions for removing the defects in the court martial system. Mr. Ivamy outlines the Law of the Theatre under four headings. Mr. Powell gives the Concept of Marriage in Ancient and Modern Law, Professor Eastwood is concerned with Trade Protection and Monopoly, and Dr. Thomas with the Origins of Administrative Centralisation. The other addresses deal with international and comparative problems: Dr. Ganado on British Public and the Civil Law in Malta, Mr. Green on the difficult topic of Human

Rights and the Colour Problem, and Dr. Schwarzenberger on the Problem of an International Criminal Law. The problems are dealt with in a bold and entertaining manner, and are commended to all.

T. E. L.

The Community of the Future. By Fr. Vinding Kruse, ll.d., Professor of Jurisprudence in the University of Copenhagen. [Oxford University Press and Einar Munksgaard, Copenhagen. 1950. vii and 828 pp. 42s.]

The main proposition of Dr. Kruse is in the last sentence of his Introduction: 'It seems as if only a new community and a new type of man can save mankind'. The greater part of the book is consideration of the law, both public and private, that would be appropriate in the community of the future. It would be very easy to write at length criticising many of his conclusions or pointing out the gulf between satisfactory general ideas and their translation into workable law. But to look at the book critically as if it were a draft would be to miss that which is really worth having. When a man of learning and character gives us his conclusions on man and his community it is the attitude and the standard of values he has that matter, and this book is a worthy product of Danish culture. The English of the translators is generally good. The printing was done in Denmark, and misprints occur more often than they would in a book printed here. There is no index.

R. M. J.

The Law of Master and Servant. Fourth edition. By Francis Raleigh Batt, ll.m., a Judge of County Courts, sometime Professor of Commercial Law in the University of Liverpool. [London: Sir Isaac Pitman & Sons, Ltd. 1950. xxxvi and 491 and (index) 28 pp. 30s. net.]

Since the publication of the third edition in 1939, the relation of master and servant has received a great deal of attention from Parliament and the courts, and the editor is to be congratulated upon his skill and care in bringing the present edition up to date. Originally designed as a student's book, the wealth of material contained in the book should make it popular with the practitioner, for it deals with every aspect of the law of master and servant. Some twenty new statutes and an equal number of statutory instruments are incorporated in the text together with the most important decisions and this has involved a great deal of re-writing. The National Insurance (Industrial Injuries) Act, 1946, looms large

throughout the book and two chapters are devoted to it. The former doctrine of common employment is relegated now, in the reviewer's opinion rightly, to an Appendix. *Collins* v. *Hertfordshire County Council* [1941] K.B. 598 is well analysed and given the importance it deserves at pp. 291–2, but as with some other recent cases the reference is only to the All England Reports, when the cases are reported in the Law Reports. A fair sampling of the book has been done, and it seems that everything of real importance can be found in the text. Perhaps *Warren* v. *Henlys* [1948] 2 All E.R. 935 deserves more than a footnote reference at pp. 238 and 259, and might appear in the text at pp. 272–3 with *Dyer* v. *Munday* [1895] 1 Q.B. 742. The index reference to *Chowdhary* v. *Gillott* [1947] 2 All E.R. 541 as pp. 292 and 308 should read 298 and 301. These are but trivial points in an edition of great merit.

T. E. L.

Elements of Patent Law. By Fred H. Rhodes. [Cornell University Press. London : Oxford University Press. 1949. iv and 184 and (table of cases and index) 5 pp. $2.75; 22s.]

Inventions, Patents and Monopoly. Second edition. By Peter Meinhardt. [London : Stevens & Sons, Ltd. 1950. xvi and 300 and (bibliography and index) 20 pp. 30s.]

Here are two books of elementary patent law, which illustrate both the strength and the weakness of the academic approach. Professor Rhodes has performed a remarkable feat of condensation : his type is large, and a large part of his book is taken up by ' potted ' cases, yet everything necessary for the passing of an elementary examination in United States patent law is here, set out with such clarity and conciseness that there is hardly a sentence that could not be used with advantage by an examinee. The key to this success is careful distinction between points of importance to the law and trivialities, and between matters belonging to the subject of the book and matters outside it. Yet in spite of a deliberate emphasis on practical questions, the lay reader of this book (as distinct from the university student) might well find that it was too abstract and also that it assumed too much knowledge of adjacent topics.

Mr. Meinhardt is more discursive. He aims to include everything that a business man would consider relevant to the subject. The result is sometimes diffuseness, but equally, some of his excursions are very valuable—the section on income tax, for instance. On the other hand, his treatment of patent law itself (English patent law, this time) does not always distinguish between important and unimportant details; while both the sequence of his presentation and the clarity of his language have suffered in places from the alterations made for this edition. (No

doubt he will correct this next time.) Thus Mr. Meinhardt is neither as concise nor as readable as Professor Rhodes; yet a business man might well prefer him, were the choice available. Since these books deal with different systems of law, those concerned would do well to read both; their time will not be wasted.

One criticism may be made of both these books. The technician who has an industrial improvement, and wants to know whether it is 'worth patenting', will not find the answer here. He will find certain rules as to 'patentability', but they are very remote. Perhaps there is no general answer, in either system of law.

T. A. Blanco White.

Divorce Case Book. By William Kee and Sherard Cowper-Coles. Consulting Editor: Geoffrey Tyndale. [Butterworth & Co. (Publishers), Ltd. 1950. xxx and 266 and (index) 13 pp. 30s.]

It is always tempting to criticise a case book on the grounds that such and such a case should have been included and such and such omitted; that the extracts are too brief or too lengthy. It would not be right to level any of those criticisms at this particular book. The authors have selected their material with care. Moreover they have avoided the usual pitfall of excessive brevity by quoting judgments at some length, and by summarising in square brackets the effect of the parts omitted. By this means it has been possible to keep the book to a reasonable size without sacrificing important detail. Assistance for the lazy has been provided in the shape of marginal lines to emphasise the important parts of the judgments. Each section is prefaced by a good introductory note, describing in skeleton form the nature of the matrimonial offences in question.

The layout of the book is good and there is a useful index, although one or two trifling misprints might have been avoided. *Usmar* v. *Usmar* on page 145 appears in the list of cases as *Usman* v. *Usman*.

No one would miss the list of 'Judges of the Court for Divorce and Matrimonial Causes and of the Divorce Division of the High Court of Justice' if it were omitted from the next edition.

One may perhaps be forgiven for asking whether this book fulfils any particular need. The student will surely have access to the reports themselves, especially so in view of the fact that the great majority of the cases set out in the book are reported in the ubiquitous All England Reports.

So far as practitioners are concerned the book commends itself primarily on the grounds of portability, possibly an important consideration in these days when porters are scarce and divorces on circuit are many.

Geoffrey Lane.

Current Law Year Book, 1949. General Editor: John Burke, Barrister-at-Law; Year Book Editor: Clifford Walsh, ll.m. [London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1950. clii and 516 and (index) 30 pp. 42s. net.]

This year's volume has not only increased in size (4277 paragraphs as compared with 3990 for 1948), but its value has been greatly enhanced by the inclusion of a 'Case Citator' and a 'Statute Citator'. The former gives a most useful guide not only to the cases decided but also to those considered, followed, distinguished or overruled during the year; the latter serves a similar purpose with regard to the Statutes passed, amended, repealed or judicially considered. A tremendous amount of work has been done to maintain and improve the efficiency of a publication which is bound to save the practitioner and academic lawyer endless labour. We make one suggestion with diffidence; that the Table of Abbreviations should include the symbols C.L.J.!

T. C. T.

The British Yearbook of International Law, 1949. Vol. 26. [Oxford University Press. 1950. viii and 556 and (table of cases) 6, and (index) 7 pp. 50s. net.]

The present volume of the *British Year Book* is dedicated to Sir Cecil Hurst, the founder of this important publication, and the opening article is a tribute to him as international lawyer, as a former President of the Permanent Court of International Justice and as principal Legal Adviser to the Foreign Office. The article is by Sir Eric Beckett, who can better than anyone else appreciate the contribution of his predecessor in these different fields and who expresses the admiration and esteem felt for Sir Cecil by all who came in contact with him, in his official work or in learned societies.

The first contribution in the field of public international law is Sir Arnold McNair's paper on 'Aspects of State Sovereignty'. This article is of great interest not only with regard to positive law, but also in respect of the history of international law. Sir Arnold is at present engaged in a study of the opinions of the law officers of the Crown for the last three or four centuries and intends to publish a book on the development and application of international law in Great Britain on this basis. The first published result of his researches indicates that a book of much more than usual interest will come out in due course. Sir Arnold's book promises also to give fresh impetus to the writing of the history of international law. It is only too true, as he himself points out, that, on the whole, the studies commonly published as contributions to the history of the law of nations tend to be either a history of international relations or a historiography of international law.

Sir Arnold's contribution is followed by an article by his successor as Whewell Professor of International Law at Cambridge University. Professor Lauterpacht's article on 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' is, of course, a major contribution to the extremely difficult field of interpretation of treaties in international law. There are indeed few subjects where there is a greater abundance of contradictory material available to the student. At times, even the most highly competent international tribunals seem to indulge in contradictory statements, even in the course of the same decision. The reason for this is, as stated by the learned author, that 'unlike the case of contracts in the sphere of municipal law, treaties, or some of their provisions, are often a political substitute for rather than a legal expression of the agreement of the parties'. He ends the article by the remarks that:

> 'The aggregate result of rules of interpretation is probably to hinder rather than to promote the proper fulfilment of the task of the judge. It is not only that occasionally they tend to obscure the intention of the parties instead of clarifying it. The more frequent occurrence is that they help to cloak with an appearance of orthodoxy and soundness an unwillingness or inability to inquire, in all requisite detail and with all requisite vigour, into all the material factors pointing to the intention, express or implied, of the parties or the legislator. However, the remedy is not to assail rules of interpretation in general. The more helpful approach is to examine individual rules in the light of principle and of their application in practice'.

The article forms part of the work on interpretation which Dr. Lauterpacht is undertaking as rapporteur for the Institut de Droit International. And it is to be hoped that he will find the time to enlarge this work into a book on the interpretation of treaties.

It is impossible in a book review to do justice to the great wealth of important articles on public international law subjects contained in the 1949 *Year Book*. Mr. Fawcett has brought his learning and his practical insight to bear on the treaty relations of the British overseas territories, and Clive Parry has used his incisive pen and penetrating mind for a study of the treaty-making power of the United Nations. Miss Morgenstern has further fortified her position as an authority on the difficult problem of asylum, and Dr. Mervyn Jones has again shown his gift for painstaking research in his article on shareholders in foreign companies. Dr. F. A. Mann has, in a most carefully thought-out article, thrown more light on the little-known problems of 'Money in Public International Law', a subject on which he is an acknowledged authority. Mr. Barton has made an interesting contribution to the study of the legal position of foreign troops and their relations to national judicial authorities, Mr. A. McDougall has thrown new light on the

important problem of the position of foreigners in Egypt after the termination of the Mixed Courts, and Miss Gutteridge has made a useful study of the Geneva Conventions of 1949. The interesting article by Professor Margaret Ball on the 'Organisation of American States and the Council of Europe', written with the author's well-known lucidity, belongs more properly to the field of international relations.

The field of private international law is very well represented with articles of great learning and practical importance by Mr. Walter Raeburn and Professor R. H. Graveson, the former on 'The Application of the Maxim *Mobilia Sequuntur Personam* to Bankruptcy in Private International Law' and the latter on 'The Domicile of a Widow in the English Conflicts of Law'.

Apart from these articles, there are the usual notes, some of them as important as the articles; the book reviews; the notes on cases and Clive Parry's useful documentary section on international organisations.

1949 is a good vintage. The international lawyers are, as usual, indebted to Professor Lauterpacht for an extremely good job of editing. Once more one is amazed at the capacity for work of the learned Cambridge professor.

G. Hambro.

International Legislation. Edited by Manley O. Hudson. Vol. IX: 1942–1945. [New York: Carnegie Endowment for International Peace. 1950. 962 pp. $4.00.]

The ninth volume of *International Legislation* contains multipartite international agreements concluded in the period from 1942 to 1945, as well as some subsidiary instruments, later in date, which can be most conveniently reproduced in conjunction with the principal agreement to which they refer. As the dates suggest, the present volume already contains the constituent instruments of a number of the international organisations which have been created since the war. The volume also demonstrates that international legislative activity of an economic or technical nature was carried on during the war on both sides of the line of war.

Like its predecessors, this volume is of the greatest value for the international lawyer. It collects, in a convenient form, the most important international agreements, and provides imposing material to support the view that multilateral treaties are the international equivalent of legislation, and differ in essence, if not as yet in form, from bilateral 'contractual' agreements. Moreover, the editorial notes which introduce the text of each reported instrument, modest though they are in size, contain valuable historical and bibliographical information. It is, apparently, proposed to terminate the series of *International Legislation* with the present volume. It is to be

hoped that that decision will be reconsidered. While, to some extent, *International Legislation* covers the same ground as the *United Nations Treaty Series*, it is by no means redundant.

F. M.

Yearbook of the International Court of Justice, 1949–1950. 193 pp.

The *Yearbook of the International Court of Justice* must already be familiar to all who take a serious interest in the work of the court. The present volume follows the established plan, giving up-to-date information on such matters as the personnel of the court and its staff, publications of the court, finance and the like. It also gives useful summary versions of judgments, advisory opinions, and orders, though of course reference must be made to the I.C.J. reports for the official texts. Important cases summarised in this volume include those on the Admission of States to the United Nations, the Interpretation of the Peace Treaties with Bulgaria, Hungary and Rumania, and the International Status of South-West Africa. There is a very useful bibliography, with full references not only to books and articles dealing with the court, but also those dealing with any matter with which the court is or may be concerned; so that it is practically a bibliography of writings in international law in general for the year. Particularly interesting is the chapter on the jurisdiction of the court, which gives the latest state of acceptance of the optional clause and reservations, and also lists and cites the relevant articles of all new instruments conferring jurisdiction on the court. It is interesting to note that some of the latest air agreements between members of the British Commonwealth show a welcome departure from the traditional practice of withholding *inter se* disputes from the jurisdiction of the court. The *Yearbook* is admirably prepared and edited, and is an indispensable book of reference for every international lawyer.

R. Y. J.

A Study of Statelessness : U.N. Publications Sales No. 1949, XIV 2. [London : H.M. Stationery Office. 1949. 190 pp. 9s.]

This study is divided into two parts. The first deals with the improvement of the status of stateless persons; the second is concerned with the elimination of statelessness. Both parts contain a succinct statement of the international position of the problem followed by a complete collection of the relevant international conventions. Although the study does not supersede the standard books on the subject, it provides a useful and up-to-date summary.

The conclusions, submitted as recommendations by the Secretary-General of the United Nations to the Economic and Social Council, are generally to be welcomed as beneficial and humanitarian, but, at least in so far as the common law countries are concerned, the insistence upon the detrimental effects of statelessness in private law and upon the ensuing need to introduce improvements seems to overestimate the importance of that aspect of the problem in private international law.

K. L.

Reports of International Arbitral Awards. Vol. III: United Nations Publications, Sales No. 1949, V.2. [London: H.M. Stationery Office. £2 10s. net.]

The third and concluding volume of this valuable collection covers the period between 1931 and 1941. Like its predecessors, it includes not only *causes célèbres* but also awards which turn upon technical points of interpretation of treaties and damages. Some of the awards have been published elsewhere, but a collection, well indexed and supplemented by bibliographical references, was long called for. All those interested in the working of International Law owe a debt of gratitude to the United Nations for having sponsored this work.

K. L.

Yearbook on Human Rights for 1948. [Lake Success: United Nations; London: H.M.S.O. 1950. xiv and 535 pp. 45s. net.]

The third issue of the *Yearbook on Human Rights* further extends the scope of this valuable publication. Part I, on national law, contains not only, as before, constitutional provisions and legislative enactments dealing with the personal freedom and social welfare of individuals. It includes also, in a separate annex, a summary of the electoral laws of various countries. This represents a welcome admission of the fact that those concerned with the protection of human rights cannot disregard the right to government by consent, without which other constitutional rights may be precarious. Part II, which deals with international agreements relating to human rights, features, for the first time, provisions of the Constitutions of Specialised Agencies which have a bearing on human rights, and agreements relating to human rights concluded under the auspices of Specialised Agencies. Moreover, it includes a section on regional agreements which demonstrates the extensive work which has been done, in the matter of human rights, within the framework of the Organisation of American States.

Part III summarises, as before, the activities of United Nations organs with regard to human rights. In particular, it contains the texts of the Declaration on Human Rights and Genocide Convention, as adopted by the General Assembly; and of the Draft Convention on Human Rights and Draft Conventions on Freedom of Information in process of elaboration and study. For the rest this section seems to reflect that a certain lassitude has crept into the work of the United Nations in this connection. For lack of time, it is stated, the Human Rights Commission and the Economic and Social Council were unable to consider one of the most pressing problems of all—measures of implementation. One valuable function which may be fulfilled by this publication will be to focus public interest on this regrettable development.

F. M.

Report of the International Law Commission covering its Second Session (June 5–July 29, 1950). [Lake Success: United Nations; London: H.M.S.O. 1950. 22 pp. 1s. 9d. net.]

This report contains the final conclusions of the International Law Commission on three topics: Ways and Means of Making the Evidence of Customary International Law More Readily Available; Formulation of the Nuremberg Principles; The Question of International Criminal Jurisdiction. Of these the second is of greatest significance for the international lawyer. The Commission has reduced to the form of seven generally applicable principles the legal rules applied by the Allied Military Tribunal at Nuremberg in pursuance of its Charter. At the same time it did not see fit to elaborate the fundamental legal concepts underlying these rules, as was suggested by some of the members. In this respect the brief comments on the seven main principles are more illuminating than the text. On the question of international criminal jurisdiction the Commission was only asked to decide whether an international judicial organ for that purpose was desirable and possible. It has answered both questions in the affirmative. The reports on ways of making the evidence of customary international law available is of practical rather than doctrinal interest. Cambridge lawyers will be gratified by the praise bestowed on the *Annual Digest and Reports of Public International Law Cases* for the work it is already doing in this field.

There are also brief reports of the views of the Commission on topics still under consideration, such as the regime of the high seas. These are of great interest, but as yet lack the authority which attaches to the considered conclusions of this body of eminent international jurists.

F. M.

De Iure Praedae Commentarius. By Hugo Grotius. Vol. I : A Translation of the Original Manuscript of 1604 by Gwladys L. Williams and Walter H. Zeydel. Vol. II : Reproduction of the Original Manuscript. [London : Oxford University Press. 1950. xxiv and 438 pp.; 163 pp. £4 4s. net.]

The publication of this early work from the pen of Grotius concludes the series of *Classics of International Law* which was initiated in 1906 by James Brown Scott. The last volume is worthy of its predecessors both in substance and in form. Its appearance is especially welcome since this work which has not been readily available offers the key to Grotius' chief work, *De Iure Belli ac Pacis.* The Carnegie Endowment and the publishers are to be congratulated for having provided the student of international law with this truly magnificent edition.

K. L.

Der Dauernde Friede. By Rudolf Laun. [Hamburg : University Press and Conrad Kloss. 1950. 44 pp. DM. 1.10.]

In this rectorial address to the University of Hamburg Professor Laun applies Kantian ethics to international law and, in particular, to the problem of the maintenance of peace. The 'categorical imperative' which commands respect for human rights finds its application within the State and is safeguarded, in positive law, by many constitutional provisions. In war, however, the dictates of this moral law are brushed aside. The problem, then, is to make the moral consciousness of man triumph over the political interests defended by State governments. This, Professor Laun suggests, must take place along lines which recognise that the power of Parliaments and Governments alike is merely derivative; the supreme legislative power is the moral and legal consciousness of all mankind.

Professor Laun admits that the required changes, both in organisation and in the mentality of human beings—who as yet feel bound blindly to follow the dictates of their authorities in matters or war and peace—will take time. But he believes that, in the same manner as men ceased to fight for the spread of their religion, they will cease to fight for the interests of their State. He might have added that at the end of the Thirty Years War religious belief had lost the fervour of the Reformation and Counter-Reformation. In other words his thesis amounts to a belief, from a historical perspective, that, in a changing world, the intensity of nationalism will cease and, with it, the desire to go to war on behalf of the nation-State. It is to be hoped that history will prove him right.

F. M.

International Monetary Fund. Annual Report (April 30, 1950). [Washington: International Monetary Fund. 1950. 160 pp.]

International Monetary Fund. Schedule of Par Values, 11th Issue (July 1, 1950). [Washington: International Monetary Fund. 1950. 21 pp.]

The fiscal year which ended on April 30, 1950, saw the devaluation of the £ sterling, and, as a direct consequence, of many other European currencies. The Annual Report of the International Monetary Fund covering that year is, accordingly, primarily concerned with examining the impact of these devaluations on the economic situation of the world, on exchange policies and problems of individual States, and on gold policy. As in previous issues there is also a discussion of the problem of exchange restrictions by reference, inter alia, to the proposed European Payments Union. Several documentary appendices, which include a summary of the exchange rate changes, complete a volume which is both informative and well produced.

The eleventh issue of the Schedule of Par Values does not show any significant changes. The par value of the currency of a number of new members of the International Monetary Fund has not yet been established.

F. M.

Manual of Foreign Law. Vol. I. General Introduction and Commercial Law. [London: H.M. Stationery Office. 1950. xxvi and 287 and (index) 9 pp. 25s. net.]

Dr. Cohn and Professor Wolff have produced an introductory textbook on German private law which is remarkable for its clarity of exposition, comprehensive learning and up-to-date information. The purpose of this volume, to present the legal members of British Military Government with a statement of German law in a form best suited to lawyers trained in the common law has been fully achieved. It required, for didactical reasons, a constant regard to the corresponding institutions of English law. The comparative lawyer would like to have seen, at times, not only a description, but also an explanation of the differences between the two legal systems, but the scope of the work precluded this. Dr. Cohn, who deals with civil law, is constantly able to employ the comparative method. As is well known, this method is least fruitful for the treatment of the law of property, and the present book is no exception (*e.g.*, see paras. 378, 422, 460). The general principles of German commercial law have no counterpart in English law, and, consequently, had to be treated in greater isolation, but a remarkably comprehensive picture has been produced within the framework of a brief sketch. As in all

works which aim at presenting one legal system in terms of another, questions of terminology figure prominently, and it is possible to disagree with the use of some terms. Some sections may require revision (*e.g.*, para. 522, end). But this does not alter the fact that the authors have written a most valuable textbook of German law for the use of lawyers who are already trained in another legal system.

K. Lipstein.

Der völkerrechtliche Schutz der Bevölkerung eines besetzten Gebiets gegen Massnahmen der Okkupationsmacht. By Oscar M. Uhler. [Zürich : Polygraphischer Verlag A.G. 1950. xx and 301 pp.]

Within a remarkably short period after the conclusion of the Geneva Conventions of August 12, 1949, a detailed commentary on the Convention for the Protection of Civilian Persons in time of war has appeared in Switzerland. This is not the place to discuss the merits and deficiencies of the Convention itself. Dr. Uhler has attempted to place the Convention in its setting, taking into account the Hague Convention on Land Warfare, the practice of States and of courts, both international and municipal. At the same time the interpretation of each article is based, as far as possible, on the *travaux préparatoires* embodied in the Draft Conventions of Tokio (1934) and of Stockholm (1948). It is clear that an undertaking on such a grand scale must touch upon practically every aspect of the law of warfare on land, but the discussion had to remain at times sketchy where a general problem of international law is concerned, if the work was not to become unwieldy.

The author has wisely refrained from offering an interpretation of the Convention article by article. Instead he has adopted a systematical treatment which enables the reader to obtain a quick conspectus of the relevant material. The book can be strongly recommended both as an introduction to the new law on the treatment of civilian populations in occupied territories and as a practical guide for the solution of individual problems.

K. Lipstein.

Das Erbbaurecht des Klassischen Römischen Rechts. By Heinrich Vogt. [Marburg an der Lahn : Simons Verlag. 1950. 118 pp. DM. 8.40.]

It is a pleasure to announce the publication of this fascinating and unusually well-written book on a hitherto obscure and much-discussed institution of Roman law. The author is not only highly

familiar with Roman private law, its vast literature and modern methods of textual criticism: he draws, in addition, on Roman inscriptions, public law and ancient economic history. The result is a monograph which presents the *superficies* as an institution of Roman law in the broad setting of Roman life. The author holds that *superficies*, in classical times, was an institution of public law, available to Rome and other municipalities in their capacity of private law owners of land which was let according to a general *lex conductionis* to tradesmen of the lower classes. Private owners of land did not employ this institution until a later date, when under-population forced them to let land on terms unfavourable to themselves which would not have been acceptable to owners in times when land was scarce and when over-population was still a burning problem. This is not the place to examine the author's thesis in detail and his evidence, especially where it relies upon critical reading of texts. But there cannot be any doubt that the author has made a valuable contribution to the study of Roman law.

K. Lipstein.

Die völkerrechtliche Verantwortlichkeit des Staates für die Presse unter besonderer Berücksichtigung der schweizerischen Praxis. By Dr. Ed. Zellweger. [1949. Zürich: Polygraphischer Verlag A.G. 144 pp. Sw.fr. 9.50.]

This book must be welcomed as a useful special study in the law relating to the international responsibility of States. After a brief survey of the general principles which govern this subject, the author examines separately the responsibility of States for illegal acts committed by the press in countries which insist on maintaining a free press and those where the press is either nationalised, or is subject to direction given and preventive censorship imposed by the government, or where it is the instrument of the party in a totalitarian system where State and party are fused. As to the latter group, it is clear that an offence committed by the press is an international delinquency from the beginning. As regards the former group the author rightly distinguishes between the Anglo-American practice which rejects responsibility except where local territory is used as a basis of aggressive action against the claimant State, and the practice of continental countries which implicitly acknowledges responsibility. This conclusion is borne out by the domestic laws of these countries which accord protection to foreign States and Governments either by enumerating the catalogue of prohibited attacks (including attacks in the press) against such States and Governments or by incorporating by reference the rules of customary International Law concerning the

protection of foreign States and Governments (whatever these rules may be). It emerges thus clearly that the problem of responsibility of the press raises two different questions according as the defendant State is totalitarian or not. Here there can be little or no direct or vicarious responsibility; there responsibility is incurred by the very act of publishing an illegal attack. The special problems which arise in peace and in wartime in a neutral country like Switzerland are examined with reference to Swiss practice. In a final chapter international conventions restricting the unbridled freedom of expression are examined briefly.

K. L.

Revista de Derecho, Jurisprudencia y Administracion. Ed. G. E. Couture. Vol. 47. 1950. [Montevideo : Impresora Uruguay, S.A.]

This Uruguayan law review is of more than local interest. The thoughtful articles frequently take into consideration not only the developments and literary movements in South America, but also in Europe and North America. It can be recommended to all those interested in Latin-American or in comparative law.

K. L.

Stein-Jonas, Kommentar zur Zivilprozessordnung. 17th ed. By Adolf Schönke. Part VII, pp. 771–911; and First Cumulative Supplement. [Tübingen: Verlag J. C. B. Mohr (Paul Siebeck). 1950. DM. 16 and DM. 18.20.]

Stein-Jonas occupies in Germany the place of the leading commentary on the Code of Civil Procedure. A revision was urgently required, since the last edition was published before the war. Professor Schönke, the author of a textbook on Civil Procedure which has gone through five editions, is eminently qualified to undertake this work. The labour of bringing a standard work of this kind up to date is heavy, especially after the fundamental changes which have taken place in Germany, but the editor has fulfilled his task thoroughly and well.

K. L.

Costumbres y Usos Constitucionales. By Jorge Raul Poviña. [Tucuman : Instituto de Derecho Publico. 1950. 144 pp.]

The interest in the theory of custom in Constitutional Law stands in inverse proportion to the practical importance of custom. Professor Poviña has been able to rely greatly on the relevant literature in civil law countries; he has found less guidance in Anglo-American writings, and he has intentionally refrained from

discussing the question in the light of the Common Law. Nevertheless, Anglo-American lawyers interested in jurisprudential problems will find in this book much thought-provoking information on the place of custom in Constitutional Law. Some of the chapters are, of necessity, concerned with well-known questions, such as that of the nature of custom and of its binding force in a legal system based upon statute. Other chapters, dealing with the place of custom in legal history and with its place in social development are a little too cursory. Those setting out the nature and function of constitutional conventions describe situations familiar to English lawyers. But the analysis of the difference in nature, function and history between custom in private and in constitutional law deserves a close study.

K. Lipstein.

Revue Hellénique de Droit International. Vol. 2. No. 1. (January–March, 1949). Published by the Institut Hellénique de Droit International et Etranger. [Athens: Librairie Cacoulides; Paris: A. Pedone.]

The second volume of this review devoted to Public and Private International Law continues to fufil the high promise which the first volume had raised. It is natural that both the articles and the practical information have a special bearing upon Greek interests and developments. In making them available to readers outside Greece, the review makes a valuable contribution to the knowledge of public and private international law.

K. L.

Jus Gentium. Nordisk Tidsskrift for Folkeret og international Privatret. Vol. I. No. 1. [Copenhagen: Ejnar Munksgaards Forlag. 1949. Annual Subscription 25 Dan.Kr.]

For this new review devoted to Public and Private International Law the editor, Professor Alf Ross, has gathered around him an impressive number of collaborators. The first number contains a series of valuable articles. The editor himself discusses the legal position of Denmark during the last war with special reference to the recent decision in *Blue Star Line, Ltd.* v. *A/S Burmeister & Wains*, U. 1948, 1237, and joins issue with Professor Lauterpacht. Judge Bagge reviews the copious literature on the present status of Germany and rejects the views set out by Mr. Jennings and Professor Kelsen. Professor Gihl surveys the Swedish practice in matters of neutrality during the two world wars. Mr. Erik Dons examines the dispute between India and South Africa in the light of the contention of the latter that the racial legislation of South Africa is a matter exclusively within its domestic

jurisdiction. Professor Sørensen writes on the functional division of modern international organisations and Dr. Hambro summarises the work of the International Court of Justice during the first three years of its existence.

The review which, as its title indicates, shows a predominant interest in Scandinavian questions, can be recommended to all students of public international law.

K. Lipstein.

Curso de Derecho Minero Argentino. By Francisco E. Padilla. [Instituto de Derecho Publico. Universidad Nacional de Tucuman. 1950. 327 pp.]

The Professor of Rural and Mining Law in the University of Tucuman has written a full treatise on the mining legislation of Argentina with special regard to the legislation of other countries. The book provides a comprehensive guide to all legal questions arising out of mining operations. It discusses the nature of ownership, mining concessions, the rights incidental to ownership, including easements, rights of support, liability towards the owners of the surface, and towards workmen, as well as the financial, economic and technical aspects, in so far as they raise legal questions. Thus the discussion extends to the legal form of mining companies, and the form of credits granted to mining enterprises.

The value of the book is enhanced by constant references to the historical background of Argentinian mining legislation, which is based not only upon Spanish sources, but drew much inspiration from French law. It is further enhanced by a careful consideration of the legislation of other countries, but this discussion does not supersede the comparative survey of mining legislation in the *Rechtsvergleichende Handwörterbuch*, II (1929) pp. 437–487. However, the volume provides a useful and balanced introduction not only to the problems of mining law of Argentina, but of the world as a whole.

K. Lipstein.

Curso de Filosofia do Direito. By Paulo Dourado de Gusmão. [Rio de Janeiro and Saõ Paulo : Livraria Freitas Bastos. 1950. viii and 196 pp.]

The title of this work is apt to be misleading, for apart from some introductory sections on the place of law in a general system of philosophy, it is devoted to topics which, in England, are treated under the head of Jurisprudence. The concept and definition of law and justice, certainty, positive law, the nature of legal rules and their classification, the sources of law, law and morals,

interpretation, gaps in the law and subjective rights, including the doctrine of abuse of rights, form the objects of successive chapters. While it is possible to agree with the author's outlook on the main questions, such as the nature of law, its relation to morals, the concept of justice and its relation to certainty, dissent must be voiced where some details are involved. Thus the division of law into public and private leads to a somewhat inconclusive discussion. The method of interpretation of statutes is examined entirely from the standpoint of a civilian, and the function of the judiciary in Anglo-American law is assessed in the wrong light.

The work is most strongly influenced by Italian and to a lesser degree by German and French writers. At times the teachings of Kelsen make themselves felt. But, on the whole, the author has steered his own, eclectic course. An extensive bibliography completes what is, after all, a well-informed introduction to Jurisprudence.

K. Lipstein.

Il Politico, Rivista di Scienze Politiche. Edited by Bruno Leoni on behalf of the Istituto di Scienze Politiche, University of Pavia. [1950. Vol. 15. Nos. 1 and 2. Annual Subscription Abroad, Lire 2500.]

Law, Sociology and Economics are the three principal subjects to which this periodical is dedicated. The balance is well maintained, and each contribution is of topical interest. International in outlook, scientific in its method, the review adheres to a high standard which is also reflected in the discussion of recent books. The attention of English readers may be drawn to a stimulating article by Professor S. H. Robertson on ' The Rate of Interest '.

K. L.

Subordinacion y Contrato de Trabajo. By Dr. Adolfo Luis Valle; *Los Derechos Sociales en la Constitucion Nacional Argentina de 1949.* By Dr. Norberto Antoni. [Publicación del Instituto de Legislación del Trabajo. 1950. Universidad Nacional de Tucuman.]

In these two addresses, read in 1949 before the *Academia de Ciencias Culturales y Artes*, Professor Valle discusses the subject-matter of labour law. This branch of legal studies is reflected in a sizeable literature on the theory of labour law, both in Western Europe and in Latin-America. Professor Valle has singled out certain aspects and has presented them in a form which bears his personal imprint. Professor Antoni gives a lucid account of those parts

of the new Argentinian Constitution which bear on social questions and of the legislation which, in the past, has laid the foundation of the modern Welfare State in Argentina.

K. L.

Review of Polish Law. Vol. 3. Nos. 3 and 4. (October–December, 1949). [Warsaw and Lodz. Ministry of Justice. 200 zł.]

The purpose of this official publication of the Polish Ministry of Justice is to provide, in the form of summaries, information about important recent legislative developments in Poland. The survey covers all branches of law and the measures, some fundamental and some technical, digested in the present number, are of considerable interest.

K. L.

Völkerrecht und Weltfrieden. By Wilhelm Sauer. 1949. [Stuttgart: Verlag W. Kohlhammer. 265 pp. DM. 18.]

It is not easy to review this book which attempts to examine at the same time the sociological and the philosophical basis of International Law in the light of the idealistic school of philosophy. The author is principally concerned with general trends and with the fundamental problems of International Law, such as its subjects, equality, States and Nations, sources, the sacrosanctity of treaties and minorities, to mention only a few. An enormous mass of material taken from history, philosophy, law, literature and music is marshalled to present a doctrine of universal validity as lofty as the author's own ideals. Unfortunately the claim to universal validity is somewhat diminished by the slightly parochial use of material which disregards studies in the same field, such as Niemeyer's *Law without Force* and Dr. Schwarzenberger's writings in (1943) 37 *American Journal of International Law* 460–479; (1944) 20 *Virginia Quarterly Review* 560–581; (1947) 60 *Harv.L.R.* 539–70; (1943) *Ethics*, 89.

K. L.

Unravelling Juvenile Delinquency. By Sheldon and Eleanor Glueck. The Commonwealth Fund. 1950. [London: Oxford University Press. 1951. xv and 385 pp. and (index) 11 pp. £2.]

The studies of adult and juvenile delinquency by Professor and Mrs. Glueck in the Harvard Law School Studies in Criminology are well known to all interested in Criminal Science in this country.

During the period 1925 to 1939 they conducted a number of inquiries into the effectiveness of various forms of penal and reformative treatment and upon these findings they constructed prediction tables on the probable after-conduct of offenders; subsequently at the invitation of the Department of Criminal Science of Cambridge University, they prepared a report on the 'After Conduct of Discharged Offenders' (1945), which summarised the methods and main findings of all their various follow-up studies.

Since 1939 their studies have been concerned mainly with the complex question of the causes of delinquency, and the book under review is the first report on their findings. The authors are not concerned in this study with isolated acts of delinquency but with the persistent or serious offender, consequently they selected 500 boys who were under reformative detention at what in this country would be termed Approved Schools. In order to investigate the difference between these juvenile delinquents and more normal children they further made a selection of 500 ordinary boys who were matched with the delinquents in age, general intelligence, ethnic origin and residence in what is termed underprivileged areas.

Their investigations were carried out on four different levels by a large team of experts. The first part of the analysis is concerned with the sociological background of the offender; the second with physique and health; the third with intellectual abilities and the fourth with temperament and character. Throughout the study the frequency of each trait in the delinquency group is compared with the frequency in the non-delinquent group and a great deal of interesting and detailed material is presented in a statistical form with explanatory text and concise summaries. The result of their research shows that a number of views held as to the cause of delinquency have little if any support in fact, for example ill-health, cultural conflicts and large families are not found to be significant in the origins of delinquency. Professor and Mrs. Glueck show that in the home and the parent-child relationship are to be found the crucial factors which create persistent offenders, a conclusion which lends support to a similar tentative view put forward by several investigators in this country. As a result of the preliminary analysis of their material the authors have constructed prediction tables which are designed to show the existence of potential delinquency at the early age of six or seven.

This first report on the causes of delinquency is a magnificent example of a careful and systematic analysis of an enormous number of factors influencing the lives of both delinquents and non-delinquents. It merits consultation by all those who are faced with the perplexing problems of dealing with juvenile delinquents in or outside courts.

F. H. McC.

The British Journal of Delinquency. Vol. 1. Nos. 1, 2 and 3. July, October, 1950, and January, 1951. [London: Institute for the Study and Treatment of Delinquency and Bailliere Tindall and Cox. Annual Subscription 27s. 6d. net.]

Those who are concerned with questions of criminology will be interested in this new quarterly journal under the editorship of Drs. E. Glover, H. Mannheim and E. Miller. The main purpose of the journal as expressed in the editorial of the first issue is 'to enable students of criminology to keep in touch with recent developments in the various branches of science concerned with the investigation, treatment and prevention of delinquency'. It is clear that whilst this journal had predominantly a psychiatric and sociological approach (for example ten of the sixteen contributors to the first three issues are primarily concerned with psychiatry), nevertheless some of the articles are of more general interest and several have been contributed by eminent authorities in foreign countries.

F. H. McC.

The Truck Acts and Industry. By F. E. Mostyn, ll.b., with a foreword by W. Tudor Davies, Barrister-at-Law, f.r.econ.s., f.i.i.a. [London: The Thames Bank Publishing Company, Ltd. 1950. xi and 140 pp. 10s. net.]

There are many dealings between employer and workman which the Truck Acts make illegal and many others which they render suspect. It is therefore of great importance that those concerned with the terms of contracts of employment should have some knowledge of the Acts. The author deals with many aspects in which industrial relations are affected by the Acts and suggests that 'condemnation of the whole creaky structure erected by the Truck Acts has long been overdue and is now urgent'.

A. L. F.

Private Corporations and their Control. By A. B. Levy, Dr. Juris (budapest), dipl.c.l.s. (cantab), ll.m. (bristol). [London: Routledge & Kegan Paul, Ltd. 1950. Two Vols. x and 916 pp. £3 10s. net the set.]

This work which is published for the International Library of Sociology and Social Reconstruction is a comparative study of business undertakings throughout the world possessing the attributes of legal entity. It deals with the Limited Company in

English Law, the Société Anonyme of France, the Aktiengesellschaft of Germany, mainly from the point of view of control and distribution of power within the corporation.

As far as English law is concerned the Companies Act, 1948, evidently came into force after the text had been prepared and although the majority of references have been amended to refer to the 1948 Act there are a number of cases where a reference is given to the Act of 1929 or a repealed section of the Act of 1947 as representing the law today, and indeed not only the references but the text itself needs bringing up to date in the light of the new Act.

A. L. F.

Law and Contemporary Problems. Vol. 15, No. 1 (Air Cargo); No. 2 (Delivered Pricing). [School of Law, Duke University. 1950. 313 pp. $1.25 per number.]

The *Quarterly Review* published by the Law School of Duke University continues to make its own significant contribution by providing symposia on topics in which law and economics are closely inter-related. Its special achievement consists in presenting the views of scholars, practitioners and businessmen on different aspects of a common problem. The two volumes on Air Cargo and Delivered Pricing provide an excellent example how this method can be employed most fruitfully. The English reader whose interests are concentrated on legal problems will find much food for thought in the presentation of the intricate system of American administrative law which serves, in the case of Air Cargo Carriers, to maintain free competition by preventing cut-throat competition through a system of licensing and minimum rates. Delivered pricing presents the other side of the same process, inasmuch as here the Administration interposes in order to curb private attempts to maintain free competition and fair prices through combinations which may injure the consumer.

K. Lipstein.

A Handbook on Bankruptcy Law and Practice. By Ivan Cruchley, ll.b., of Gray's Inn, Barrister-at-Law. [London: The Solicitors' Law Stationery Society, Ltd. 1950. xx and 208 pp. 18s. net.]

This book is intended to be a guide to bankruptcy law for legal practitioners. It does not deal with the rights and duties of a trustee in bankruptcy in respect of the collection and distribution of the bankrupt's estate; for example there is no reference to

disclaimer of onerous property or to the rule in *Ex p. James* and fraudulent preference is only dealt with incidentally as an act of bankruptcy. As a very large portion of a practitioner's work in bankruptcy consists of advising trustees in bankruptcy on their rights and duties in collecting and distributing the estate this would appear to be a very serious lacuna and one which should be remedied in any future edition. It is also disappointing to find in the text only the briefest reference to extortion and in the index no reference at all, as lack of knowledge of the rules relating to this topic may involve a solicitor acting for a petitioning creditor in a very serious predicament.

On the topics which are dealt with the book should prove quite a useful elementary survey.

A. L. F.

Oyez Practice Notes. No. 16. *Summary Judgment in the High Court.* By J. F. Josling. [London : The Solicitors' Law Stationery Society, Ltd. 1950. 42 pp. 3s. 6d. net.]

This contains useful notes on proceedings in the High Court under Order XIV and is fully annotated with cases. There may be some doubt about the need for a booklet on this topic as it is very adequately covered in the *Annual Practice.*

A. L. F.

Oyez Practice Notes. No. 18. *Costs in Arbitration.* By J. L. R. Robinson. [London : The Solicitors' Law Stationery Society, Ltd. 1950. 61 pp. 6s. 6d. net.]

This deals with the practice relating to the taxation of costs in various types of arbitration. The booklet is well indexed and contains 36 pp. of precedents which should be very useful.

A. L. F.

Books also received:—

A Catalogue of the Library of Sir Edward Coke. Edited by W. O. Hassall, Bodleian Library, Librarian at Holkham, with a Preface by Samuel E. Thorne. Yale Law Library Publications, No. 12. 1950. Yale University Press. London : Oxford University Press. xxvii and 98 pp. (12s. 6d. net.).—Mr. Hassall gives an illuminating account of the Library of the Cokes containing 20,000 books housed at Holkham in Norfolk. From bindings or marginalia and dates of publication, and from Chief

Justice Coke's own library catalogue, he has disentangled 'the lawyer's library and revealed its nature unobscured by later accretions'. Coke's catalogue was found in the estate office among papers relating to Godwick, the village in which he lived. It was written out under his close personal supervision, and at frequent intervals he has inserted his autograph signature. There are 1,227 entries of books both printed and manuscript arranged under broad subject heads, subdivided when the number is sufficient according to size and language and whether manuscript or printed. There are books in Latin and Greek, but modern foreign languages account for one third of the total, and the Italian books are three times as numerous as the French. The following summary of the items shows Coke's catholic taste and that the main body was law and history. Divinity 292; Lawes of England 142; Civill Lawe 57; Approved Histories 229; Philosophie, Rethoricke, Grammar, Lodgicke and Schoolebookes 63; Phisieke and Naturall Philosophie 34; Poetry 62; Dictionaries 31; Severall Sciences, Tracts and Discourses, Antiquities and Rarities 317. Professor Thorne, in his Preface, sums up the importance of Coke's Catalogue. It refutes the nineteenth century notion that Coke's back 'was ever turned against learning outside the common law', and is a necessary preliminary to further Coke studies.

These Rights and Freedoms. United Nations Department of Public Information, 1950. H.M. Stationery Office. 1950. 214 pp. (10s. net.)—This is one of the most useful publications so far issued by the United Nations. It gives a detailed account of the drafting of the Universal Declaration of Human Rights and of the legislative history of each of its articles. For those to whom the unwieldy records of the Commission on Human Rights are not accessible that account is bound to prove invaluable. Whatever may be the legal value of the Declaration, there is no doubt that the drafting of its articles and its final provisions throw illuminating light on the corresponding articles of the proposed Covenant of Human Rights. In addition, the book contains chapters giving an account of the work of the United Nations and its organs in such diverse fields as freedom of information; prevention of discrimination and protection of minorities; equal rights for women; refugees and displaced and stateless persons; prevention and punishment of the crime of genocide; freedom of association and Trade Union rights; forced labour; slavery; and protection of human rights in trust and non-selfgoverning territories. The Appendix enhances the usefulness of the book by giving the texts of the Universal Declaration of Human Rights; of the Convention on the Prevention and Punishment of the Crime of Genocide; of the Convention on the International Transmission of News and the Right of Correction; and of the Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.

The North Atlantic Treaty, The Brussels Treaty, and The Charter of the United Nations. By Sir W. Eric Beckett. London : Stevens & Sons, Ltd. 1950. viii and 75 pp. (10s. 6d. net.)—The text of this book consists in a revision of an address made by Sir Eric Beckett to the International Law Association in May, 1949. The London Institute of World Affairs is to be congratulated on having persuaded Sir Eric to its publication, together with the texts of the relevant instruments and on having thus made available a spirited defence of the North Atlantic Treaty. The distinguished author's argument is a strictly legal one : that the Treaty is incompatible neither with the ' Principles ' of the United Nations, as set forth in Article 2 of the Charter, nor with any specific provision of the Charter. He rejects by the way the view that the Treaty is a ' regional arrangement ' within the meaning of Chapter VIII. And, on the broader issue, he points with effect to the distance the United Nations has moved since San Francisco and to the logic and necessity, in a situation where the probability is that if war breaks out the Security Council will not be able to reach decisions, for concluding such purely defensive arrangements as the Treaty in fulfilment of the primary ' Purpose ' of the United Nations ' to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression '.

The Customs Union Issue. By Jacob Viner. London : Stevens & Sons, Ltd., for the Carnegie Endowment for International Peace. 1950. viii and 221 pp. (20s. net.)—The ' issue ' dealt with in this tenth and last monograph in the Carnegie Endowment's series entitled ' Studies in the Administration of International Law and Organisation ' is the utility of the customs union as a device of international economic co-operation and its compatibility with other such devices. It is written by a distinguished American economist and is essentially a work on international economics. But the lawyer will find much to interest him in it—especially in the chapters on the Political Aspects of Customs Union and The Havana Charter and Customs Union. Thirty pages of the volume are, moreover, taken up with a list of treaties and other documents, such as legislative enactments, relating to various past or present customs unions. The documents in this list have been collected together by the Carnegie Endowment and are available for consultation. This study has been based upon them and both will be starting-points for any further work on the matter.

It would appear fitting to append to a notice of Dr. Viner's work a reminder to students of international law of the great services which the Carnegie Endowment has rendered to them. They may regret certain recent changes of policy, which would appear to be having the effect of putting an end not only to this series of *Studies* but also to Professor Hudson's *International Legislation*

and to the subvention to the *Annual Digest and Reports of Public International Law Cases*, which last, however, will go on. But, notwithstanding the decision of the Endowment that it can no longer afford support on anything like the same scale as heretofore, the magnitude of its services to international legal scholarship must be acknowledged with gratitude.

The Law and Custom of the Sea. By H. A. Smith. London: Stevens & Sons, Ltd. Second Edition. 1950. xii and 216 pp. (12s. 6d. net.)—The appearance already of a second edition of Professor Smith's refreshing little book perhaps indicates that it has been discovered by those for whom it is primarily intended—active officers of the Royal and Merchant Navies. There is much in it to interest the lawyer also. The learned author has a gift for clear summary comparable to that of his fellow Oxonian, the silver-tongued author of *The Law of Nations*. But it must be recognised that he handles a highly controversial subject and that much thin ice surrounds the waters upon which he sails. Nowhere is this more evident than in the new chapter entitled 'The Responsibility of the Individual'. Not everyone will be willing to accept some of the propositions advanced in this chapter, especially that to the effect that 'the law under which the Germans [*i.e.*, the major war criminals] were punished was made specially for the occasion by the victors long after the alleged acts were committed' (p. 182). But one knows that this is a view which is widely held and, further, that some 'former naval persons', as well as ever-active soldiers (for it is understood that a field-marshal can never retire), would not have wished the German admirals and generals to go down to death or disgrace in the manner their judges decreed. In these circumstances it is difficult to quarrel with Professor Smith's advice to officers of all ranks which is, in effect, not to assume that an enemy into whose hands they may fall will take the same view of the law as their own State.

A Manual of International Law. By Georg Schwarzenberger. London: Stevens & Sons, Ltd. Second Edition. 1950. lii and 428 pp. (25s. net.)—Dr. Schwarzenberger's *Manual* has now gone into a second edition. The pagination is unaltered, and, as the author explains in his Preface, the variation of the text is confined to a 'relatively few changes which events since the publication of the first edition of the *Manual* have made necessary'. The study outlines and the reading lists have been revised somewhat. Readers who consult the list of the other works of the author which is printed opposite the title page will observe that Dr. Schwarzenberger usually goes into second editions and that the second edition of his *Power Politics* is in the press. It is to be hoped that this programme of revision will not impede unduly the publication of the second and third volumes of his tri-voluminous *International Law*,

which have been awaited now for five years—a period punctuated, incidentally, by the appearance of a second edition of the first volume—and without which it is difficult to judge adequately either of that volume or of this distillation of it.

Exchange and Borrowing Control. Supplement. By F. C. Howard. London : Butterworth & Co. (Publishers) Ltd. 1950. iv and 28 pp. (4s. net.)—This is a noter-up to *Howard on Exchange and Borrowing*, reviewed in this Journal, Vol. 10 (1949), p. 320. It is clearly very useful, especially to those in practice, in view of the peculiar susceptibility to change of this complicated part of the law.

The Ratification of International Treaties. By Jose Sette Camara. Toronto : The Ontario Publishing Company, Ltd. 1949. xii and 173 pp. (Price unstated.)—This is a thesis submitted to the Faculty of Graduate Studies and Research of McGill University in partial fulfilment of the requirements for the degree of Master in Civil Law. It is singular in that Professor Kelsen contributes a Foreword and in that it was quoted in the debate of the International Law Commission on Professor Brierly's draft on the law of treaties.

The Law of Trusts. Fifth Edition. By G. W. Keeton, m.a., ll.d., of Gray's Inn, Barrister-at-Law, Professor of English Law in the University of London; Dean of the Faculty of Law, University College, London. London: Sir Isaac Pitman & Sons, Ltd. 1950. lix and 430 and (index) 40 pp. (30s. net.)—A book that has run through five editions in sixteen years speaks for itself and needs no introduction or commendation. The new edition is welcome, it is the best student's book on the subject. The whole text has been considered, much of it rewritten, particularly the chapter on Charities, and the section on following the trust property (pp. 358–376) has been recast in the light of the decision of the Court of Appeal in *Re Diplock* [1948] 1 Ch. 465. It is a great improvement to have the Trustee Act, 1925, set out with explanatory notes at pp. 390–428. At pp. 40–41 it should be noted that sections 6 and 9 of the Forfeiture Act, 1870, have been repealed by the Criminal Justice Act, 1948. The Married Women (Restraint upon Anticipation) Act, 1949, and the reversal of Vaisey J.'s decision in *Re Wellsted's Will Trusts* by the Court of Appeal [1949] Ch. 296, were too late for inclusion in the text.

Phipson's Manual of Evidence. Seventh Edition. By Sir Roland Burrows, k.c., Reader in Evidence at the Inns of Court. London : Sweet & Maxwell, Ltd. 1950. xxvi and 284 and (index) 23 pp. (22s. 6d. net.)—This edition follows the lines of its predecessors. The preliminary outline of seven pages is an admirable

summary of the subject. Book I deals with the production of evidence; Book II its admissibility as to (i) facts, (ii) witnesses, and (iii) documents; and Book III with its weight, presumptions and estoppels. It has been thoroughly brought up to date to the end of 1949, but a few cases decided in 1950 are included. The main additions are at p. 76, the reversal of the rule in *Russell* v. *Russell* [1924] A.C. 687 by the Law Reform (Miscellaneous Provisions) Act, 1949, s. 7; at pp. 112–114, several new cases on the Evidence Act, 1938. The substance of some twenty statutes passed since the last edition, and a number of important decisions since that date are incorporated in the text. The long experience which Sir Roland Burrows has of the needs of students, and his reputation and learning, guarantee that the revision is thoroughly and accurately done, and the *Manual* remains one of the best books for students.

The Rent Acts. Fifth Edition. By R. E. Megarry, m.a., ll.b., of Lincoln's Inn, Barrister-at-Law, Assistant Editor of the *Law Quarterly Review*; Assistant Reader in Equity to the Council of Legal Education. London: Stevens & Sons, Ltd. 1950. xlix and 442 and (index) 18 pp. (30s. net.)—The authority and reputation of this admirable work is still increasing; it has been quoted several times in the Court of Appeal. The new edition has some two hundred more cases—some from New Zealand—and they range down to the end of November, 1949. This coupled with the Landlord and Tenant (Rent Control) Act, 1949, the Housing Act, 1949, and the relevant statutory instruments have meant an addition of some one hundred and fifty pages. The arrangement of chapters is much the same, but a great deal of rewriting has been done in incorporating the new material. It is the product of great ability, energy and industry. Every topic is dealt with thoroughly, accurately and clearly. It needs no recommendation.

Slater's Mercantile Law. Twelfth Edition. By R. W. Holland, o.b.e., m.a., m.sc., ll.d., of the Middle Temple, Barrister-at-Law, and R. H. Code Holland, b.a., of the Middle Temple, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1950. xliv and 615 and (index) 38 pp. (15s. net.)—This is a clear and accurate introduction to the subject, and is deservedly popular with students preparing for the professional examinations. This edition incorporates the Limitation Act, 1939, the Law Reform (Frustrated Contracts) Act, 1943, the Transport Act, 1947, and the Companies Act, 1948. The substance of the leading cases since 1939 finds a place in the text. The select cases, with extracts from the judgments covering some eighty pages are well chosen and could profitably be increased in a later edition. The editors have taken every care in the preparation of this edition, and have made the student's task as light as possible in a wide and complicated subject.

Stevens' Elements of Mercantile Law. Eleventh Edition. By John Montgomerie, b.a., of Lincoln's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers) Ltd. 1950. xliii and 663 and (index) 80 pp. (15s. net.)—The new editor has succeeded in 'leaving intact the wisdom of his predecessor and providing more modern illustrations of old principles'. He has accomplished a difficult task with skill and accuracy. The text has been rewritten to include the effect of the Limitation Act, 1939, the Law Reform (Frustrated Contracts) Act, 1943, the Exchange Control Act, 1947, and of recent cases, including the much discussed *High Trees Case.* In the more specialised parts, we have among others, the Transport Act, 1947, the Companies Act and the Merchant Shipping Act, 1948, the Air Corporations, Civil Aviation, Patents and Registered Designs Acts of 1949. Much that formerly appeared in the appendices is now properly placed in the text. The student has been spared from such complex and (it is hoped) temporary matters as price controls, import and export licences, etc. A section has been added on hire-purchase, and the chapter on stock exchange transactions has been considerably enlarged. Students will welcome this new and up-to-date edition as a concise guide to the main principles of mercantile law.

Underhill's Principles of Partnership Law. Sixth Edition. By George Hesketh, m.a., ll.m., of Lincoln's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers) Ltd. 1950. xxviii and 180 and (index) 27 pp. (12s. 6d. net.)—Little change has taken place in this branch of the law since the last edition of 1936, and the main additions are the Limitation Act, 1939, the Companies Act, 1948, the Married Women (Restraint upon Anticipation) Act, 1949. The latter Act has meant an additional paragraph at p. 33; *Tower Cabinet Co., Ltd.* v. *Ingram* (1949) (holding out) and *Noble Lowndes and Partners* v. *Hadfields, Ltd.* (1939) (proceedings in firm's name) are dealt with in the text. At p. 29, although there may be practical reasons for not having a 'convict' as partner, there is no legal reason for the provisions of the Forfeiture Act, 1870, have been repealed by the Criminal Justice Act, 1948. The new edition retains its place as one of the best introductions to the subject.

Police Law. Tenth Edition. By Cecil C. H. Moriarty, c.b.e., ll.d. London: Butterworth & Co. (Publishers) Ltd. 1950. xx and 504, table of statutes, 26; tables of orders and regulations, 3; table of cases, 3; index 33; notes on Emergency Legislation and index, 22 pp. (10s. net.) A policeman's lot may not be a happy one; but it could only be utter misery without *Moriarty's Bible.* Its object is to instruct the policeman in the maze of laws and regulations he has to administer; but everyone interested in criminal law,

its principles and its administration will find it extremely useful and full of practical information. The Criminal Justice Act, 1948, made a new edition necessary, but the book contains 37 additional statutes, including 18 of the years 1948 and 1949, the relevant statutory orders and regulations and recent decisions. The Justices of the Peace Act, 1949, and the Vehicles (Excise) Act, 1949, came too late but are noted in the Preface. A multitude of offences are dealt with; the book is well written, and no effort has been spared in reducing to a minimum the task of looking up any topic and providing the latest information.

Industrial Injuries. (This is the Law Series.) Second Edition. By H. Samuels, M.A., of the Middle Temple and North-Western Circuit, Barrister-at-Law, and Robert S. W. Pollard, Solicitor of the Supreme Court. London: Stevens & Sons, Ltd. 1950. vii and 99 and (index) 5 pp. (4s. net.)

Local Rates. (This is the Law Series.) By J. H. Burton, F.S.I.A.A. London: Stevens & Sons, Ltd. 1950. ix and 86 and (index) 4 pp. (4s. net.)—The first book explains in simple language who is entitled to benefit, what injuries are covered, what contributions are payable and the benefits available, the procedure for making a claim, and the alternative remedies. The new edition deals with the main effect of the National Insurance (Industrial Injuries) Act, the Law Reform (Personal Injuries) Act, 1948, and a score of new Regulations issued thereunder. It should be of real value to anyone who has to advise a workman.

Mr. Burton has succeeded in explaining in a simple manner the complications of rating and valuation, the distinction between rates and taxes, how and by whom and on what basis rates are made, allowances from rates, and objections and appeals. He explains the procedure before and after February 1, 1950. Other matters dealt with are returns and penalties, recovery of rates by distress and imprisonment of the defaulter, rating limits, and miscellaneous practical problems.

The Idea of Usury. By Benjamin N. Nelson. Princetown: Princetown University Press; London: Oxford University Press. 1949. xxi and 233 and (indices) 32 pp. ($3.00 : 20s. net.)—This is the third number in the History of Ideas Series. It is an historical survey on the meaning and development of the commandment in Deuteronomy which forbade the Hebrew to take usury from his brother but permitted it from a stranger. The story is told from the days of Jerusalem with its prophets and priests, through the casuistical contentions of the Middle Ages down to the middle of the nineteenth century, and the attempt to accommodate an ancient economic precept of tribal society into a world that was fastly

moving towards capitalism. It is well documented and the bibliography covers some sixty pages.

The Law of Advertising. By W. J. Leaper, of the Inner Temple, Barrister-at-Law; Assistant General Secretary of the Advertising Association. London: Butterworth & Co. (Publishers) Ltd. 1950. xxxiii and 334 and (index) 37 pp. (21s. net.)—This is a brand new and highly original book. It is a storehouse of knowledge on the law, and everything that savours of it in relation to advertising. The author has the dual qualification of being a barrister and a secretary of the Advertising Association. Lawyers, business men, advertising agents and even government departments will find this book a good investment. The introductory chapter deals with the parties concerned and the relationships involved in publishing an advertisement, the common law and the canons of interpretation of statute law. The law of contract is well summarised at pp. 14–61, and the all-important liabilities arising from agency cover pp. 62–80. There follow chapters on the legal pitfalls, copyright, patents and designs, trade marks and passing-off, sale of goods and defamation. Then specific problems are discussed—the law relating to the display of advertisements,—an amazing collection of statutes and regulations, dealing with the display, control and prohibition of advertisements, pp. 164–214. This is followed by a chapter on organisations and codes of standards relating to the subject. The appendices set out in full the regulations made under the Town and Country Planning Act, 1947, relating to outdoor advertisements, Labelling and Sale of Food Orders, and relevant sections of the Pharmacy and Medicines Act, 1941, and the Prevention of Frauds (Investments) Act, 1939 (pp. 229–306). Finally there is set out the codes of standards voluntarily adopted by various associations concerned with advertising (pp. 307–334).

The Elements of Drafting. By E. L. Piesse, a Solicitor of the Supreme Court of Victoria, and J. Gilchrist Smith, ll.m., a Solicitor of the Supreme Court. London: Stevens & Sons, Ltd. 1950. xvi and 123 and (index) 9 pp. (10s. net.)—These articles were written for the use of students attending the tutorial classes conducted by the University of Melbourne, and were later published in Australia. Mr. Gilchrist Smith has skilfully adapted them for the needs of English students by substituting English statutes and cases for the Australian, and added some practical points that are peculiar to English law. After an introductory chapter dealing with five cardinal rules of drafting, there follows, Arrangement, structure and order of sentence; Drafting in paragraphs; Use of definitions; Habits to be avoided (a most valuable chapter); 'Shall': Provisos; Problems of 'And' and 'Or'; Aids to Clearness and Accuracy; and Expressions relating to time. It is a clear

explanation of the rules, full of sound suggestions and eminently suitable for the lawyer who has recently qualified.

The Inheritance of the Common Law. By RICHARD O'SULLIVAN, K.C., Recorder of Derby; A Master of the Bench of the Middle Temple. London: Stevens & Sons, Ltd. 1950. viii and 118 pp. (8s. net.)—This is the second series of the Hamlyn Lectures. English and Continental attitudes towards law, religion and freedom are sharply contrasted. The learned author is as much at home with philosophy, poetry, religion, economics and history, as he is with the law; the width of his reading is prodigious. The lectures are scholarly and delightfully written. They deal with the historical development of freedom within the common law which produced that 'self relying stalwart creature' down to the statutory man who has to lean on Whitehall; the family as the true unit of society and the changing attitude towards divorce; the political community and the relation between Church and State. They end with law and conscience, the rise of the Court of Chancery, and a hope for the revival of the divine gifts of faith and freedom.

The Hearsay Rule. By R. W. BAKER, B.C.L., B.LITT., LL.B., Professor of Law in the University of Tasmania; Rhodes Scholar, Practitioner of the Supreme Court of Tasmania. London: Sir Isaac Pitman & Sons, Ltd. 1950. xxi and 170 and (index) 10 pp. (30s. net.)—This work was written as a thesis for the Oxford degree of Bachelor of Letters and is a scholarly contribution to the law of evidence. It defines and states the nature of the hearsay rule, traces its background, its theory and history and the growth of arbitrary and technical distinctions. The greater part is devoted to the present long list of recognised exceptions; these are examined in detail with constructive criticism. The final chapter is an appraisal of the rule with suggestions as to its future course. It is a clear and well arranged treatise, the views of American and English writers are contrasted and well over three hundred cases are examined. The hearsay rule owes its existence to our system of trial by jury, and as that form of trial is exceptional in civil cases today, there is much to be said in favour of the author's suggestions that liberal modifications should be made in the rule, or that it should be abolished and a new principle substituted. His final contention is that the historical development of the hearsay rule should be reversed, and the principle should be established that all relevant evidence is admissible unless some rule of policy excludes it. The beginnings of a re-orientation of approach in the law relating to similar facts are to be seen in Lord Goddard C.J.'s judgment in the Court of Criminal Appeal in *R.* v. *Sims* [1946] K.B. 531, 537. It is a stimulating and interesting study.

The New Industrial Law. By W. F. Frank, dr.jur., m.sc. (econ.), b.comm., ll.b. London : The Thames Bank Publishing Co., Ltd. 1950. xix and 445 and (index) 10 pp. (35s. net.)—This book is new in its method of approach to industrial law. This subject can no longer be regarded as an extended discussion on the law of master and servant, for as State control over industry extends so must the subject itself cover a wider field. The author has made a thorough investigation in that fertile ground which ' lies between law, economics, political science and psychology '. He covers the economic legislation of England and makes an interesting comparison with its American counterpart. He states the law as it was on January 1, 1950. Part I deals with the economic background, policy and the legal issues. Part II is concerned with the location of industry, the Distribution of Industry Act, 1945, and the Town and Country Planning Act, 1947. Part III—industrial organisation with an analysis of the Industrial Organisation and Development Act, 1947. Part IV—industrial and trade statistics, the Statistics of Trade Act, 1947. Part V—monopoly and the State, American anti-trust legislation, the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. Part VI—inventions and the law, the Development of Inventions Act, 1948, the Patents and Designs Act, 1949. Part VII—covers such current labour problems as education and training, labour placement and its mobility. The work is a scholarly and valuable contribution to a subject of great interest and importance which is growing at a rapid rate.

Family Inheritance. By Laurence Tillard. Second Edition. By P. R. Oliver, b.a., of Lincoln's Inn, Barrister-at-Law. London: The Thames Bank Publishing Co., Ltd. 1950. viii and 55 and (index) 3 pp. (7s. 6d. net.)—This is an up to date account of the Inheritance (Family Provision) Act, 1938. The introduction outlines the objects and limitations of the Act, the jurisdiction of the court and the procedure to be followed. The text of the Act is set out with annotations to each subsection. Reference is made to the most important English decisions, and to numerous cases on the three New Zealand Statutes on Family Protection. Full notes are then given of some eighteen important decisions on the Act of 1938.

Archbold's Criminal Pleading, Evidence and Practice. Thirty-first Edition. Supplemented Service. Issue No. 3. London : Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 1950. This special noter-up section, issued free to subscribers, brings the law up to date to September 1, 1950.

Green's Death Duties. Second Edition. Third (Cumulative) Supplement. By H. W. Hewitt, ll.b., of the Estate Duty Office.

London: Butterworth & Co. (Publishers) Ltd. 1950. iv and 121 pp. Main work and Supplement 55s. Supplement alone (7s. 6d. net).—This brings in the Finance Act, 1950, several important new cases, the Rules of the Supreme Court (No. 1) 1950, the Double Taxation Relief (Estate Duty) (Netherlands) Order, 1950, and the law is stated as on August 1, 1950.

Probate and Estate Duty Practice. By the late EDGAR A. PHILLIPS, O.B.E., LL.B. Second (Cumulative) Supplement to the Fourth Edition. London: The Solicitors' Law Stationery Society, Ltd. 1950. 77 pp. (5s. net.)—This states the law up to April 30, 1950, but throughout, the references to fees are those of the consolidating Non-Contentious Probate Fees Order, 1950, which came into operation on September 1, 1950.

Baron David Hume's Lectures, 1786–1822. Volume II. Edited and annotated by G. CAMPBELL H. PATON, M.A., LL.B. Edinburgh: The Stair Society. 1949. xxxiii and 288 pp.—These lectures are taken from the original MSS of the lectures in the Library of the Faculty of Advocates, Edinburgh, and were delivered by the late Baron Hume during the session 1821–22 as Professor of Scots Law in Edinburgh University. They have been compared with copies of Students' Notes, and passages from the latter have been added in the footnotes. They comprise Part II of the course and cover the law of contract, sale, location, charter party, loan, mandate, society cautionary and bills of exchange.

The Trials of Frederick Nodder. (The Mona Tinsley Case.) Notable British Trials Series. Edited by WINIFRED DUKE. London: Edinburgh: Glasgow: William Hodge & Co., Ltd. xiii and 242 pp. (15s. net.)—In 1937 Nodder was convicted of the fraudulent abduction of Mona Tinsley, aged ten, and sentenced by Mr. Justice Swift to seven years penal servitude. At the time of that trial, her body had not been found, but after intensive and widespread search by the police it was found in the River Idle. Nodder was charged with murder at the Nottingham Assizes, found guilty and executed. At the first trial there were remarkable passages between Mr. Justice Swift and Mr. Maurice Healy, counsel for the defence. Mr. Justice Macnaghten held the second trial. The book maintains the high standard of this great series.

Negligence in the Civil Law. Introduction and Select Texts. By F. H. LAWSON, D.C.L., of Gray's Inn, Barrister-at-Law, Professor of Comparative Law in the University of Oxford. Oxford University Press. 1950. xvi and 335 and (index) 5 pp. (25s. net.)

Introduction to English Law. By PHILIP S. JAMES, M.A., of the Inner Temple, Barrister-at-Law, formerly Fellow of Exeter College,

Oxford. London : Butterworth & Co. (Publishers) Ltd. 1950. xvi and 409 and (index) 21 pp. (12s. 6d. net.)

A Textbook of the Law of Tort. By Sir P. H. Winfield, K.C., F.B.A., LL.D.(Cantab), HON.LL.D., Harvard, Leeds and London. Emeritus Professor of English Law, Cambridge, Fellow of St. John's College, Cambridge : of the Inner Temple, Honorary Bencher and Barrister-at-Law. Fifth Edition. London : Sweet & Maxwell, Ltd. 1950. xxxiv and 678 and (index) 15 pp. (40s. net.)

Prideaux's Forms and Precedents in Conveyancing. Twenty-fourth Edition. By J. Brook Richardson, M.A., LL.B., of the Middle Temple and Lincoln's Inn, Barrister-at-Law. Supplement to Volume I. London : Stevens & Sons, Ltd. ; The Solicitors' Law Stationery Society, Ltd. 1950. 20 pp.—This deals with the Town and Country Planning Act, 1947.

The Death Duties. Tenth Edition. By Robert Dymond, formerly Deputy Controller of the Estate Duty Office, Somerset House, Solicitor. Assisted by R. K. Johns, LL.B., of the Estate Duty Office. Third (Consolidated) Supplement to December 31, 1949. London : The Solicitors' Law Stationery Society, Ltd. xiii and 113 pp. Book and Supplement 55s. Supplement (10s. 6d. net).

Foa's Landlord and Tenant. Seventh Edition. First Supplement, July, 1950. By S. W. Magnus, B.A., of Gray's Inn, Barrister-at-Law. Hadleigh: The Thames Bank Publishing Co., Ltd. 84 pp. (7s. 6d.)

Revista Juridica de la Universidad de Puerto Rico. Vol. XIX. Nos. 1–3. 1949–1950. No. 2 contains a ' Comparative Study of the Doctrine of Juridical Personality ', by Alberto Ferrer.

New Yugoslav Law. Vol. I. Nos. 1–3. 1950. Published by the Association of Jurists of the Federative People's Republic of Yugoslavia. Administration and the Board of Editors. Belgrade.

Proceedings of the Provincial Lawyers' Conference, held at Coimbatore, May 15 and 16. 1950. Madras. 93 pp.

Boletin Instituto de Legislacion del Trabajo. Universidad Nacional de Tucuman. Ano I. No. 3. 1950. Argentina.

Lifeline. The Eleventh. Spring. 1950. Published by Lifeline, Gray's Inn Chambers. High Holborn, London. (3s. 6d. net.) Contains an article pp. 18–26 by Mr. Richard C. Fitzgerald on ' The Law and the Dominions '.

Human Law and the Laws of Nature in China and the West. By JOSEPH NEEDHAM, F.R.S., SIR WILLIAM DUNN, Reader in Biochemistry in the University of Cambridge, formerly Director of the Sino-British Science Co-operation Office, Chungking. L.T. Hobhouse Memorial Lecture. No. 20, delivered at Bedford College, London, 1950. London : Oxford University Press. 1951. 44 pp. (2s. 6d. net.)

Jurisprudence in a Nutshell. By P. G. OSBORN, LL.B., of Gray's Inn, Barrister-at-Law. v and 112 and (index) 2 pp. (6s. net.)

Constitutional Law in a Nutshell. By JAMES HEATH, M.A., B.C.L., of Lincoln's Inn and the Oxford Circuit, Barrister-at-Law, Lecturer at King's College, Newcastle. xii and 151 and (index) 6 pp. (6s. 6d. net.)

Local Government Law in a Nutshell. Third Edition. By RALPH MILLNER, M.A., of the Inner Temple, and JOHN G. M. RIMMER, B.A., LL.B., of Lincoln's Inn, Barrister-at-Law. London : All from Sweet & Maxwell, Ltd. 1950. vi and 206 and (index) 4 pp. (8s. 6d. net.)—A student who pays heed to the warnings contained in the prefaces, that the Nutshells are not a substitute for other works, and consults some of the textbooks suggested, should find them very useful in discovering the scope of the topics almost at a glance, and in assisting with revision. The authors have brought their Nutshells up to date.

Questions and Answers on Constitutional Law and Legal History. By D. M. GRIFFITH, M.A., Fourth Edition by G. ELLENBOGEN, M.A., Barrister-at-Law. iii and 117 pp. (6s. 6d. net.)

Questions and Answers on Conflict of Laws. By E. SLEIGH, LL.B., Barrister-at-Law. London : Both from Sweet & Maxwell, Ltd. 1950. iii and 80 pp. (6s. net).

A Manual of International Law. By BRIAN GALPIN, M.A., of the Middle Temple and Western Circuit, Barrister-at-Law. London : Sweet & Maxwell, Ltd. 1950. viii and 88 pp. (6s. net.)—An epitome of the principles, an account of the practical attitude of States towards their theoretical rights and obligations, and of the Council of Europe.

The Reshaping of French Democracy. By GORDON WRIGHT. London : Methuen & Co., Ltd. xi and 288 and (index) 9 pp. (15s. net.)

The National Health Service Act, 1946. Annotated. Supplement to 1948 edition including the 1949 Amending Act and Statutory

Instruments. By S. R. SPELLER, LL.B., of Lincoln's Inn, Barrister-at-Law, Secretary and Director of Education of the Institute of Hospital Administrators. London : H. K. Lewis & Co., Ltd. 1951. xii and 285 and (index) 36 pp. (27s. 6d. net.)

Russia and the United States. By PITERIM A. SOROKIN. Second Edition. No. 15. Library of World Affairs. London : Published under the auspices of the London Institute of World Affairs. Stevens & Sons, Ltd. 1950. xi and 209 and (index) 4 pp. (12s. 6d. net.)

Über die Objektivität der Rechtsprechung. By OTTO BRUSIIN. Helsinki. 122 pp. (No price given.)

Die Rechtslehre vom Vertrauen. By HERMANN EICHLER, Professor of Law at the Academy for Economic and Social Sciences. Nuremberg. Tübingen : J. C. B. Mohr (Paul Siebeck). 1950. 123 pp. (DM.12 net.)

The Need for an Inquiry into Divorce. By ROBERT S. W. POLLARD. Reprinted from *The Contemporary Review*, January, 1951. London : Marriage Law Reform Society, Rooms 11/12, 20 Buckingham Street, Strand. 8 pp. (No price given.)

Nathan's Equity through the Cases. Second Edition. By O. R. MARSHALL, M.A.(CANTAB), PH.D.(LONDON), of the Inner Temple, Barrister-at-Law, Sub-Dean of the Faculty of Laws and Lecturer in Law at University College, London. London : Stevens & Sons, Ltd. 1951. lx, 522 and (index) 6 pp. (35s. net.)

A Comparative Survey of Anglo-American and Latin-American Law. By PHANOR J. EDER, New York University Press. London : Oxford University Press. 1950. xii, 159, and (Selected Bibliography) 91, and (index) 6 pp. (48s. net.)

Trade Union Law. By N. A. CITRINE, LL.B., London. Solicitor of the Supreme Court (Honours) : Legal Adviser to the Trade Union Congress, with a Foreword by the RT. HON. LORD JOWITT, and an Introduction by the RT. HON. SIR HENRY SLESSER. London: Stevens & Sons, Ltd. 1950. xliv, 664 and (index) 36 pp. (45s. net.)

Jackson & Gosset's Investigation of Title. Sixth Edition. By EDMOND H. BODKIN, B.A., of Lincoln's Inn, Barrister-at-Law. London : Stevens & Sons, Ltd. 1950. lxiv, 433 and (index) 57 pp. (50s. net.)

Russell on Crime. Tenth Edition. By J. W. C. TURNER, M.C., M.A., LL.B., of the Middle Temple, Barrister-at-Law; Fellow of Trinity Hall, Cambridge. Two vols. London: Stevens & Sons, Ltd. 1950. Vol. 1, civ, 941; Vol. 2, viii, 945–1909, and (index) 53 pp. (£10 10s.)

Dymond's Death Duties. Eleventh Edition. By R. DYMOND, Solicitor, formerly Deputy Controller of the Estate Duty Office, and R. K. JOHNS, LL.B. (London) of the Estate Duty Office. London: Solicitors' Law Stationery Society, Ltd. 1951. lxxxvii, 801 and (index) 57 pp. (75s. net.)

Hugo L. Black. A Study in the Judicial Process. By CHARLOTTE WILLIAMS. London: Johns Hopkins Press, Oxford University Press. 1950. vii, 204 and (index) 4 pp. (28s. net.)

The Papers of Thomas Jefferson. Vol. 2. 1777 to June 18, 1779, including the Revisal of the Laws, 1776–1786. JULIAN P. BOYD, Editor; LYMAN H. BUTTERFIELD and MINA R. BRYAN, Associate Editors. London: Oxford University Press. 1950. xxiv, 665 pp. (80s. net. (Series Subscription, 70s.).)

The Justices' Handbook. A Guide to Law, Evidence and Procedure in Magistrates' Courts. By J. P. EDDY, K.C. Second Edition. London: Stevens & Sons, Ltd. 1951. xiv, 196 and (table of statutes) 14, and (table of cases) 4 and (index) 8 pp. (12s. 6d. net.)

Woolley's Handbook on Death Duties. Seventh Edition. By JOHN H. MUNKMAN, LL.B., of the Middle Temple, Barrister-at-Law. London: The Solicitors' Law Stationery Society, Ltd. 1950. xxiii, 228 and (index) 21 pp. (27s. 6d. net.)

Civil Procedure for Examinees. Recent Examination Questions with Answers. Third Edition. By H. B. EVANS, LL.B., of the Inner Temple, and the Wales and Chester Circuit, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1951. iii, 89 pp. (6s. net.)

Equity in a Nutshell. By IAIN J. BLACK, of Gray's Inn, Barrister-at-Law, and ELIZABETH TWEED, of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1951. vii, 203 pp. (6s. 6d. net.)

Miller's Questions and Answers on Evidence. Second Edition. By M. MCLAREN, of the Middle Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1951. xvii, 119 pp. (6s. 6d. net.)

Civil Procedure in a Nutshell. Sixth Edition. By D. BOLAND, M.B.E., Clerk of The Lists, King's Bench Division, Royal Courts of Justice. London: Sweet & Maxwell, Ltd. 1951. v, 142 and (index) 3 pp. (6s. 6d. net.)

Communications concerning articles and notes should be sent to Professor S. J. Bailey, St. John's College, Cambridge. Books for review should be sent to The Cambridge Law Journal, *Squire Law Library, Cambridge.*

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